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No. 99-

IN THE
Supreme Court of the United States

SHOPPERS FOOD WAREHOUSE MD CORP.,
Petitioner,

vs.

ASUNCION MORENO,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a long-arm statute constitutionally reach a nonresident defendant when the defendant's only activities in the forum consist of advertising and when the out-of-state accident did not arise from that advertising?

PARTIES TO THE PROCEEDING BELOW

The parties in the District of Columbia Court of Appeals were plaintiff Asuncion Moreno and defendant Shoppers Food Warehouse MD Corp. Shoppers Food Warehouse MD Corp. is currently owned by Rich Food Holdings, Inc., which in turn is owned by SuperValu Inc.

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PETITION FOR A WRIT OF CERTIORARI

Shoppers Food Warehouse respectfully petitions for a writ of certiorari to review the 4-3 *en banc* decision of the District of Columbia Court of Appeals, holding that personal jurisdiction exists over petitioner in this case. In reaching this conclusion, the lower court rejected petitioner's contention that due process precludes personal jurisdiction over a nonresident defendant regarding a slip-and-fall accident that occurred in Maryland when the defendant's only forum contact consists of advertising in a metropolitan newspaper based in the District of Columbia and when the accident did not stem from that advertising.

OPINIONS BELOW

The *en banc* decision of the District of Columbia Court of Appeals (Pet. App. 1a-41a) is published at 746 A.2d 320 (2000); the original panel decision (Pet. App. 44a-63a) is published at 715 A.2d 107 (D.C. 1998); and the decision of the Superior Court of the District of Columbia (Pet. App. 69a-73a) is unpublished.

JURISDICTION

The District of Columbia Court of Appeals entered its *en banc* decision on February 17, 2000. Jurisdiction in this Court exists under 28 U.S.C. § 1257. The notifications required by Rule 29.4 and 28 U.S.C. §§ 2403(a) & 2403(b), which may be applicable in this case, are being made with the service of this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The District of Columbia's long-arm statute provides in relevant part:

> (a) A District of Columbia Court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's —

> (1) transacting any business in the District of Columbia;
>
> * * * *
>
> (4) causing any tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;
>
> * * * *
>
> (b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

D.C. Code § 13-423.

The Due Process Clause of the Fifth Amendment provides:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

U.S. Const., amend. V.

STATEMENT OF THE CASE

This case presents a recurring federal question, one that has deeply divided the lower courts, one that the court below acknowledged has prompted conflicting rulings, one that this Court has previously acknowledged but declined to address, *see Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984), and one that this Court previously decided to review, *Carnival Cruise Lines, Inc. v. Shute*, 498 U.S. 807-08 (1990), but ultimately did not reach, 499 U.S. 585, 589 (1991). The issue is this: Does the Due Process Clause permit the District of Columbia or any State (collectively "State") to compel a nonresident to defend a personal-injury action in its jurisdiction when the accident

occurred outside of the forum, when the defendant's only forum contacts consist of advertising in a metropolitan newspaper, and when the tort was not caused by the defendant's advertising? Because the Court has not yet explained the requisite connection between a plaintiff's injury and a defendant's forum contacts before specific personal jurisdiction may be asserted over a nonresident and because the issue has generated a serious division of authority in the lower courts, petitioner respectfully submits that the question is ripe for review in this case.

1. On November 20, 1993, Asuncion Moreno slipped and fell on a piece of okra while shopping in Takoma Park, Maryland at a grocery store owned by Shoppers Food Warehouse MD Corp. ("Shoppers"). Ms. Moreno is a resident of the District of Columbia. Shoppers is a Maryland corporation with its principal place of business in Lanham, Maryland. Shoppers has stores in Maryland and Virginia, but does not maintain any stores or offices in the District. Nor does it have an interest in any property in the District or sell any goods or supply any services there. While the grocery store places advertisements in The Washington Post, whose primary circulation includes the District, Maryland and Northern Virginia, "Ms. Moreno never claimed to have seen" the advertisements before going to the Shoppers store. Pet. App. 18a.

2. On April 5, 1994, Ms. Moreno filed a negligence complaint against Shoppers in the Superior Court of the District of Columbia, alleging that Shoppers failed to keep its premises in a reasonably safe condition. Ms. Moreno attempted to obtain personal jurisdiction over Shoppers under the long-arm statute of the District of Columbia. That statute is designed to be "coextensive in reach with . . . the due process clause," Pet. App. 8a, and permits jurisdiction (1) in cases "arising from the person's . . . causing tortious injury in the District of Columbia by an act or omission outside the District

of Columbia if he regularly does or solicits business . . . in the District of Columbia," D.C. Code § 13-423(a)(4), or (2) in cases "arising from the person's . . . transacting any business in the District of Columbia," D.C. Code § 13-423(a)(1).

3. Shoppers promptly moved to dismiss for lack of jurisdiction, arguing that the exercise of personal jurisdiction over it would violate due process. On June 22, 1994, the trial court denied Shoppers' motion. It concluded that jurisdiction did not lie under section 13-423(a)(4) because no injury had been caused "in" the District of Columbia. Still, it found jurisdiction constitutionally permissible under section 13-423(a)(1). In the court's view, it was "reasonable" to require Shoppers to defend the lawsuit in the District because it "owns numerous stores in Maryland and Virginia, several of which are located within a few miles of the District of Columbia border," and it "solicit[s] customers in the District" through advertisements in The Washington Post. Pet. App. 4a.

4. On August 18, 1995, Shoppers moved for reconsideration. In doing so, it pointed to a recent federal court decision, *Duffy v. Shoppers Food Warehouse MD Corp.*, No. 93-2372 (D.D.C. July 31, 1995), in which the court held on virtually identical facts that due process precluded Shoppers from being forced to defend a tort action in the District. Nonetheless, the trial court denied the motion, after which the case proceeded to a jury trial. On September 14, 1995, the jury returned a verdict in favor of Ms. Moreno, awarding her $197,307 in compensatory damages. Shoppers filed several post-trial motions, and continued to challenge the constitutionality of asserting personal jurisdiction over it. On December 15, 1995, the trial court issued a final order denying each of these post-trial motions, after which Shoppers appealed. Pet. App. 65a.

5. On July 16, 1998, a divided panel of the District of Columbia Court of Appeals affirmed, rejecting Shoppers' claim that the District of Columbia lacked personal jurisdiction over

it. Pet App. 44a. Shoppers sought *en banc* review of the panel's decision on the jurisdictional issue, which the Court of Appeals granted on January 4, 1999. Pet. App. 42a.

6. On February 17, 2000, a 4-3 majority of the *en banc* Court of Appeals affirmed. At the outset the majority acknowledged that both the District of Columbia courts and the Federal trial courts within the District had "disagreed" over this "difficult matter" — specifically whether "advertising constitutes a sufficient nexus for the District's exercise of personal jurisdiction over a nonresident defendant in a personal injury lawsuit where the injury took place" in a different jurisdiction. Pet. App. 5a. The court then found it "unnecessary" to decide whether Shoppers' "business contacts" with the District "were 'sufficiently continuous and systematic' to confer general jurisdiction in this case," *id.* at 19a, because "if the claim either arises out of *or* relates to the nonresident defendant's business activity, specific jurisdiction may be exercised," *id.* at 22a.

In considering how to measure whether a cause of action "arises from" or is "related to" a defendant's contacts with a State for specific-jurisdiction purposes, the court observed that "[o]ther jurisdictions have wrestled with" the question "and have reached diverse conclusions as to the appropriate test for determining the proper nexus between the nonresident defendant's business activity and the claim asserted by the plaintiff." *Id.* at 23a. The Ninth Circuit and the Supreme Judicial Court of Massachusetts, the majority noted, have adopted a "but for" test, simply asking whether "'but for' the defendant's forum-related activities, the injury would have occurred." Pet. App. 26a (citations omitted). Other courts, the majority added, have rejected a "but for" test in favor of a "proximate cause" test, which requires "the forum contacts [to] be necessary to the proof of the cause of action." Pet App. 23a (quotation omitted). The majority opinion identified the First Circuit as the main proponent of this test. Pet. App. 24a.

Still other courts, the majority noted, have focused less on whether the forum contacts caused the claimant's injuries and more on whether they are "related to" or have a "substantial connection" to the injury. Pet. App. 24a-28a. The majority characterized the Supreme Courts of California, Connecticut and Minnesota all as embracing this test: (1) "the Supreme Court of California decided to retain its 'substantial connection' test as a flexible standard which best interprets the relatedness requirement" (citing *Vons Companies, Inc. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1096 (Cal. 1996)); (2) the Minnesota Supreme Court says that when a claim "'has a 'substantial connection' with the forum state, specific jurisdiction exists'" (quoting *Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 31 (Minn. 1995)); (3) the Connecticut Supreme Court says that due process does "'not [] require a causal connection between the defendant's solicitation here and the plaintiffs' lawsuit'" but only that "'it was reasonably foreseeable that, as a result of that solicitation, the defendant could be sued in Connecticut by a solicited person on a cause of action similar to that now being brought by the plaintiffs'" (quoting *Thomason v. Chemical Bank*, 661 A.2d 595, 603 (Conn. 1995)). Pet. App. 27a-28a.

Based upon its "review of nexus tests used in other jurisdictions, [and] the criticisms leveled at some of them," the majority ultimately adopted a "substantial connection" or "discernible relationship" test. Pet. App. 28a. That is to say: To have specific jurisdiction over such claims, the injury need not be caused by the forum contacts but must only "have some 'discernible relationship'" to the defendant's activity in the forum. The court then found that Shoppers' advertising satisfied this test -- first, because the activity had "a discernible relationship to a claim by a District resident who becomes a customer in one of Shoppers' stores and is injured"; and, second, "because it is reasonably foreseeable that, as a result of advertising extensively and over a substantial period of time in the District's major circulation newspaper, Shoppers could be

sued in the District on a claim similar to that filed by Ms. Moreno." *Id.* The court rejected Shoppers' argument that "the nexus requirement is not satisfied because there is no inherent relationship between the duty breached (to provide a safe store) and the 'transaction' of advertising in the District of Columbia media." Pet. App. 29a. In the court's view, this theory would permit only a claim for "something akin to false advertising" and would impose "too heavy a burden" on the plaintiff when it comes to personal-injury actions like this one.

Chief Judge Wagner dissented on the ground that "[t]he mere fact that a foreign corporation advertises for business within the District of Columbia is insufficient" to exercise personal jurisdiction over tort claims that "arise wholly in the foreign state." Pet. App. 31a. Judge Schwelb, joined by Judge Steadman, likewise dissented on the ground that Ms. Moreno's slip-and-fall claim could not arise from advertising that she did not see. *Id.* at 41a.

REASONS FOR GRANTING THE WRIT

At stake in this case is the type of relationship between a defendant's forum activity and a cause of action that must exist before the Due Process Clause permits specific jurisdiction to be exercised over a nonresident defendant. Is the pertinent connection between the forum activities and the injury a matter of "proximate" causation? Is the connection a matter of "but for" causation? Or is it one of a "substantial" or "discernible" relationship? The lower courts are hopelessly conflicted over the answer, and show no signs of reconciling these outcome-dispositive differences in perspective any time soon.

Nor is this Court unfamiliar with the issue. The Court explicitly identified, but declined to decide, the question in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984). *Compare id.* at 424-28 (Brennan, J., dissenting). And in *Carnival Cruise Lines, Inc. v. Shute*, 498 U.S. 807-08 (1990), the Court granted review of the question

but ultimately resolved the case on statutory grounds by applying a forum-selection clause to the claimant, 499 U.S. 585, 589 (1991). Since *Helicopteros* and *Carnival Cruise*, this lower-court split in authority has not abated. Not only has the number of highest State courts and Federal courts of appeals that have taken sides on the issue increased but the number of jurisdictions with competing Federal and State court decisions affecting the same State has grown as well. Residents of the District of Columbia, Massachusetts and California, for example, all face different jurisdictional tests in this area depending solely on the happenstance of whether the claim is brought in Federal or State court. The elimination of that intolerable development — dueling legal tests applicable not just to citizens in different jurisdictions, but to citizens of the same State — by itself ought to justify review. For these reasons and those elaborated below, the Court should grant the writ.

I. The Court Should Resolve A Lower-Court Split Over When A Cause Of Action Arises Out Of Activities In The Forum State For Purposes Of Asserting Specific Personal Jurisdiction Over A Nonresident Defendant.

A. Due Process Requires Minimum Contacts With A State Before It May Assert Long-Arm Jurisdiction Over A Nonconsenting Defendant.

The Due Process Clause limits the power of State courts to issue a valid personal judgment against a nonresident defendant. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Court held that the Clause imposes significant limits on the ability of States to employ long-arm statutes to compel nonconsenting parties to defend lawsuits in a foreign jurisdiction. In the frequently-repeated words of *International Shoe*, the defendant must have "certain minimum contacts" with the forum and those contacts must be such that "the maintenance of the suit does not offend 'traditional notions of

fair play and substantial justice.'" *Id.* at 316 (citations omitted).

In applying these requirements, the Court has distinguished between efforts to assert jurisdiction over causes of action that arise out of the defendant's activities in the forum State and those that do not. On one side of the ledger, when the cause of action does not stem from the defendant's forum activities, those activities must be sufficiently "continuous and systematic" before the assertion of *in personam* jurisdiction will be permitted. *Perkins v. Benguet Consol. Mining Co.*,, 342 U.S. 437, 438 (1952). The Court has referred to this exercise of power as one of "general" jurisdiction. *Helicopteros*, 466 U.S. at 414 n.9.

On the other side of the ledger, "specific" jurisdiction requires fewer contacts with the forum State, but does require a showing (1) that the defendant "'purposefully directed' his activities at residents of the forum," and (2) that "the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and *Helicopteros*, 466 U.S. at 414). In specific jurisdiction cases, "the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction." *Helicopteros*, 466 U.S. at 414 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

The Court has considered several cases dealing with the first aspect of the specific jurisdiction inquiry — whether the defendant sufficiently directed its activities at the forum State to subject it to jurisdiction. *See, e.g., Burger King, supra* (upholding jurisdiction for suit involving contractual relationship of nonresident franchisee); *Calder v. Jones*, 465 U.S. 783 (1984) (upholding jurisdiction for libel suit based upon distribution of publication in plaintiff's home State); *Keeton v. Hustler Magazine, Inc.*, *supra* (upholding jurisdiction

for libel suit by nonresident based upon regular distribution of publication in forum State); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (denying jurisdiction where automobile is sold to plaintiff who then drives to forum State). What the Court has had less occasion to consider, and did not need directly to address in each of these cases, was when alleged contact with a forum State sufficiently "arises out of or relates to" the subject matter of the litigation.

In *Helicopteros*, it is true, Justice Brennan raised the issue and thoroughly explained how it should be analyzed in his dissenting opinion. 466 U.S. at 424-28. But the opinion for the Court declined to reach the question because the parties had failed to raise it themselves. *Id.* at 415-16 & n.10. Six years later in *Carnival Cruise Lines*, the Court granted review of the question in a personal-injury action originating in the Ninth Circuit. As in this case, the defendant's only contacts with the forum involved advertising. And, as in this case, the court of appeals held that a personal injury occurring outside of the forum still arose from that advertising for specific jurisdiction purposes. 895 F.2d 377, 385. In the aftermath of the lower court's decision, this Court granted review (498 U.S. 807-808 (1990)) of the following question: "Can a long-arm statute constitutionally reach a defendant whose activities in the forum state are insubstantial and bear only a tenuous relationship to the cause of action?" While the parties briefed and argued the "arising out of" question under this Court's specific-jurisdiction case law, the Court decided the case on the basis of a forum-selection clause signed by the parties. 499 U.S. 585, 589 (1991).

B. A Deep Division Of Authority Exists Among The Lower Courts Regarding The Type Of Relationship That Must Exist Between The Litigation And The Defendant's Forum Activities To Establish Specific Jurisdiction.

Both before and after *Helicopteros* and *Carnival Cruise Lines*, the highest courts of several States and most of the Federal Circuits have struggled to determine when a cause of action "arises from" a nonresident defendant's forum contacts and when accordingly specific jurisdiction may be asserted over an unwilling defendant. The *en banc* opinion for the court of appeals identified at least three different schools of thought on point: (1) one focused on a "proximate cause" relationship between the defendant's forum activities and the cause of action; (2) another focused on a "but for" relationship between those contacts and the claim; and (3) still another focused not on a cause-and-effect relationship between the two but more loosely on a "substantial connection" or "discernible relationship." In analyzing these different views, the court identified at least six highest courts (including its own) that had taken conflicting stands on the question left open by *Helicopteros* and *Carnival Cruise Lines*. While this lower-court uncertainty by itself ought to justify review, the majority opinion in truth understates this depth of division.

The most stringent of the three standards is the "proximate cause" test. It requires the claimant to show that jurisdiction "is premised on a contact that is a legal cause of the injury underlying the controversy — i.e., that form[s] an important, or [at least] material, element of proof in the plaintiff's case." *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 715 (quotation omitted). The First, Second and Eighth Circuits all have approved variations of a "proximate cause" standard as the primary benchmark for specific jurisdiction. In considering the issue most recently, the First Circuit noted that proximate cause "distinguishes between foreseeable and

unforeseeable risks of harm," while a "'but for'" requirement . . . has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." *Id.* at 715. While continuing to "emphasize the importance of proximate causation" -- that jurisdiction "is premised on a contact" that is an "element of proof in the plaintiff's case" -- the First Circuit has also permitted "a slight loosening of that standard when circumstances dictate." *Id.* at 715-716; *see also Clark v. City of St. Augustine, Fla.*, 977 F. Supp. 541, 544 (D. Mass. 1997) ("Although St. Augustine's solicitation of tourism within Massachusetts satisfies the 'but for' causation standard required by the long-arm statute, it does not satisfy the due process proximate cause standard because, while in Massachusetts, the [plaintiffs] had no contact or contract with the City"). The Eighth and Second Circuits also seem to favor a proximate cause requirement. *See Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983) (Tennessee company's solicitation of Arkansas resident to visit Opryland was insufficient to show that a subsequent negligence claim "arose out of the solicitation in Arkansas") (construing Arkansas long-arm statute, not due process clause, though both turn on "arising out of" requirement); *Gray v. Lewis & Clark Expeditions, Inc.*, 12 F. Supp. 2d 993, 998 (D. Neb. 1998) ("[C]auses of action involving negligence at tourist sites do not arise out of enticing advertisements directed at the forum state"); *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir. 1964) (bus injury based on negligence in Nevada did not arise from contractual sale of tickets by travel agency in New York). The Supreme Court of Iowa also appears to apply a proximate cause standard. *See State of Iowa ex rel. Miller v. Baxter Chrysler Plymouth, Inc.*, 456 N.W.2d 371, 377 (Iowa 1990) (upholding specific jurisdiction for "consequences that arise proximately from" forum activities -- in that instance from unlawful advertising that reached the forum State) (quotation omitted). District courts from the Third and Tenth Circuits

have reached similar results. *See Wims v. Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 267-68 (E.D. Pa. 1991) (holding that "causal link" between New Jersey motor inn's advertising in Pennsylvania and plaintiff's injury in New Jersey was "too attenuated" to say that injury "arose from" advertising); *Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971, 975 (D. Kan. 1986) (failing to find "causal connection" between foreign cruise line's advertising in forum and personal-injury claim).

Instead of requiring the forum contact to be an element of the cause of action as under the "proximate cause" test, several other courts merely require a "but for" causative relationship between the forum contacts and the claim. The Ninth Circuit continues to be the most ardent defender of this test. In *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds* 499 U.S. 585 (1991), the court held that this test "preserves the essential distinction between general and specific jurisdiction." There, the court held that "but for" the defendant's advertising in the forum State, the plaintiff would not have taken the cruise on which she was injured and therefore the injury "arises out of" the promotional activities. *See also Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) (following "but for" test). The Massachusetts Supreme Court also embraces this approach, concluding in a recent case that a California hotel's solicitation of business from Massachusetts residents satisfied the "arising out of" requirement where, but for the hotel's solicitations and acceptance of reservations, the plaintiff would not have suffered a personal injury in California. *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 551 (Mass. 1994).

Other courts, while less explicit, also favor a "but for" approach to this inquiry. In *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981), the Fifth Circuit analyzed the problem this way:

> Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a "but for" causative factor for the tort since it brought the parties within tortious "striking distance" of each other. While the relationship between a tort suit and a contractual contact is certainly more tenuous than when a tort suit arises from a tort contact, that only goes to whether the contact is by itself sufficient for due process, not whether the suit arises from the contact.

The Seventh Circuit describes the necessary relationship similarly as whether the claims "lie[] in the wake of [the] commercial activities" of the defendant in the forum. *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (7th Cir. 1984).

The third lower-court test in this area is the least stringent. Unlike the courts that require some sort of causative relationship between the claim and forum contacts, these courts merely require "the operative facts of the controversy" to be "related to the defendant's contact with the state." *Third Nat'l Bank in Nashville v. WEDGE Group Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989). Adherents to this school of thought *(id.)* point out that the Supreme Court has described the specific jurisdiction inquiry both in terms of an "arising out of" and a "related to" connection, *Helicopteros*, 466 U.S. at 415 n.10, then look to Justice Brennan's dissenting opinion in *Helicopteros* to support this test, *id.* at 427 ("Limiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant's contacts with the State would subject constitutional safeguards . . . to the vagaries of the substantive law or pleading requirements of each State."). In addition to the District of Columbia Court of Appeals here, the Sixth Circuit follows this approach, *WEDGE Group*, 882 F.2d at 1091 & n.2 (finding jurisdiction because the claim had "a substantial connection with" and is "related to" defendant's forum contacts), as do the Fourth, Eleventh and

Federal Circuits. *See Akro Corp. v. Luker*, 45 F.3d 1541, 1547 (Fed. Cir. 1995) (adopting related to standard); *City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487 (4th Cir. 1985) ("the activities that support the jurisdictional claim must coincide with those that form the basis of the plaintiff's substantive claim"); *Southwire Co. v. Trans-World Metals & Co.*, 735 F.2d 440, 442 (11th Cir. 1984).

Several State Supreme Courts have followed this approach as well. *See Vons Companies, Inc. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1096 (Cal. 1996) ("A claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate"); *Cornelison v. Chaney*, 545 P.2d 264 (Cal. 1976); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 31 (Minn. 1995) (when a claim "has a 'substantial connection' with the forum state, specific jurisdiction exists"); *Thomason v. Chemical Bank*, 661 A.2d 595, 603 (Conn. 1995) ("arising out of" test does "'not [] require a causal connection between the defendant's solicitation here and the plaintiffs' lawsuit" but only that "it was reasonably foreseeable that, as a result of that solicitation, the defendant could be sued in Connecticut . . . on a cause of action similar to that now being brought by the plaintiffs'") (purporting to construe "arising out of" language of long-arm statute, not due process clause). *See also Arguello v. Industrial Woodworking Mach. Co.*, 838 P.2d 1120, 1124 (Utah 1992) (declining to find jurisdiction where "the contacts of the out-of-state defendant are unrelated to plaintiff's claims").

Besides reflecting vastly different ways of articulating this test, the lower-court cases also reflect vastly different results. Disparate verbal formulations of the appropriate relationship between a cause of action and the defendant's forum contacts, it turns out, serve more than semantic ends; they have had

distinct jurisdictional consequences. And that is especially true in the context of cases like this one and *Carnival Cruise Lines*, where the sole contact with the forum consists of some form of advertising and the claim stems from an out-of-state personal injury. Some courts, like the District of Columbia Court of Appeals in this instance, have found personal jurisdiction over nonresident defendants under circumstances akin to those here. *See, e.g.*, Pet. App. 29a-31a (finding jurisdiction over a personal-injury action based solely on advertising in a metropolitan newspaper); *Creech v. Roberts*, 908 F.2d 75, 80 (6th Cir. 1990) (finding jurisdiction over out-of-state malpractice action based exclusively on advertising and solicitations in forum); *Shulte v. Carnival Cruise Lines*, 897 F.2d 377 (finding jurisdiction over a personal-injury action based solely on solicitations in the forum); *Harriman v. Demoulas Supermarkets, Inc.*, 518 A.2d 1035, 1038-39 (Me. 1986) (finding jurisdiction over personal-injury action based on advertising, soliciting, and establishing business relationships with suppliers in forum). *See also Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 436-37 (Tex. 1982) (finding jurisdiction over breach of contract action involving foreign corporation that advertises in Texas).

Other State and Federal courts have found that advertising alone does not suffice to establish personal jurisdiction. *See, e.g., Pearrow v. National Life and Accident Ins. Co.*, 703 F.2d at 1069 (sending brochures into forum to solicit customers does not authorize state courts to confer personal jurisdiction over out-of-state defendant in slip-and-fall action); *Fidelity and Cas. Co. of New York v. Philadelphia Resins Corp.*, 766 F.2d 440, 447 (10th Cir. 1985) (advertisement in national trade publication insufficient to subject party to personal jurisdiction in negligence action); *Scheidt v. Young*, 389 F.2d 58 (3d Cir. 1968) (advertising and telephone conversations do not support jurisdiction for personal injury at out-of-state lodge); *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d at 321-22 (sale of tickets through travel

agency does not support jurisdiction for personal injury on out-of-state bus trip); *Camelback Ski Corp. v. Behning*, 539 A.2d 1107, 1111-12 (Md. 1988) (toll-free telephone number and other solicitation activity in forum do not support jurisdiction for personal injury at out-of-state ski resort); *Munley v. Second Judicial Dist. Court of Nevada*, 761 P.2d 414, 415-16 (Nev. 1988) (advertising and promotional activities in forum are not sufficient to subject ski resort in neighboring state to jurisdiction in personal-injury action); *Clark v. City of St. Augustine, Fla.*, 977 F. Supp. at 545 ("advertis[ing] extensively" in the forum did not subject Florida city to personal jurisdiction in Massachusetts in slip-and-fall action); *Bayles v. K-Mart Corp.*, 636 F. Supp. 852 (D.D.C. 1986) (advertising in forum did not subject Virginia retail store to personal jurisdiction in the District of Columbia in slip-and-fall action). *See also Glidewell Motors, Inc. v. Pate*, 577 P.2d 1290, 1292 (Okla. 1978) (advertising in newspaper circulated in forum did not subject nonresident defendant to jurisdiction in automobile-title dispute).

This division among the lower courts, together with this Court's near encounter with the issue in *Helicopteros* and *Carnival Cruise Lines*, also has prompted a spirited debate among legal commentators. Here, too, a wide range of views has developed. *See, e.g., Maloney*, Note, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?*, 50 Wash. & Lee L. Rev. 1265, 1300 (1993) ("The modified 'but for' test will allow courts to achieve flexibility without completely sacrificing structure"); Twitchell, *A Rejoinder to Professor Brilmayer*, 101 Harv. L. Rev. 1465, 1468 (1988) (preferring "the formality of the substantive relevance test"); Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444. 1458-64 (1988) (rejecting the "but for" test); Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 656 (1988) (criticizing the "substantive relevance approach"); Richman, *A Sliding Scale to Supplement the Distinction Between General*

and Specific Jurisdiction (Part II), 72 Calif. L. Rev. 1328, 1339 (1984) ("[*Helicopteros*] serves only to enhance the awareness of the issue"); Brilmayer, *How Contacts Count: Due Process Limitations On State Court Jurisdiction* 1980 Sup. Ct. Rev. 77.

As these numerous case citations and law review articles suggest, the issue presented implicates a deep and abiding division in the lower courts and among legal scholars. Ample time has been given to allow enlightened perspectives on the issue to develop, and if it was appropriate to grant review of the issue in *Carnival Cruise Lines* in 1990, it seems doubly appropriate to do so today in view of the large number of federal circuits and state supreme courts that have issued opinions on the matter. Even under the most forbearing application of the lower-court conflict considerations of Rule 10, this federal issue is ripe for review.

II. This Recurring Federal Question Is Exceedingly Important.

In addition to the stark division of lower-court authority, the essential nature of this federal question independently justifies granting the writ. First, as the extensive case citations in the petition illustrate, this issue arises frequently in litigation and is of substantial importance to the day-to-day workings of the Federal and State courts. The issue arises whenever a nonresident company advertises in one forum and an injury occurs in another. Not just the travel industry faces this issue, as in *Carnival Cruise Lines*, but so also do ski resorts, as in *Camelback, supra*, and all manner of retailers, as in this case. The frequency with which the issue is litigated, together with the large number of lower courts that have cried out for guidance from this Court over its proper resolution, reinforces the consequential nature of this federal question. *See, e.g., Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d at 1096 n.4 ("[t]he high court has declined to clarify the relatedness element of specific jurisdiction"); *Doe v. National Med. Serv.*, 974 F.2d

143, 146 (10th Cir. 1992) ("[t]he Supreme Court has not addressed whether there is a distinction between suits which 'arise out of' and those which 'relate to' the defendant's contacts"); *Third Nat'l Bank in Nashville v. WEDGE Group Inc.*, 882 F.2d at 1091 n.2 (In *Helicopteros* "the Supreme Court expressly declined to reach the questions (1) whether the terms 'arising out of' and 'related to' describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contact with a forum is necessary to a determination that either connection exists."); *Thomason v. Chemical Bank*, 661 A.2d at 599-600 ("In the context of 'specific' jurisdiction, although the United States Supreme Court has required the plaintiff's cause of action to 'arise out of or relate to' the defendant's forum-directed activities, that court has not articulated a standard for what constitutes 'arising out of.'"); *see also* Maloney, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?* 50 Wash. & Lee at 1265-66 ("A particularly troublesome problem that courts face today is the confusion and inconsistency of the requirement that a cause of action 'arise from or relate to' the defendant's contacts with the forum state in order for a court to assert specific personal jurisdiction. With the United States Supreme Court's refusal to consider the issue in *Shute v. Carnival Cruise Lines*, it appears that the confusion will persist.").

Second, the importance of the issue goes beyond whether a nonresident defendant should be compelled to litigate an action in a foreign jurisdiction based on the slimmest of forum-related contacts. It also goes to a fundamental question of federalism and interstate comity — the extent to which one State may import a cause of action that another State ought by custom and rights have power to resolve in its own courts. The constitutional restrictions on personal jurisdiction thus are "more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial

limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958). In this respect, due process "act[s] as an instrument of interstate federalism," *World-Wide Volkswagen*, 444 U.S. at 294, permitting the States to retain one of the "essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts," *id.* at 293. The minimum contacts inquiry accordingly "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 291-92. Preserving these foundational lines between the power of one sovereign State over that of another is uniquely a function of this Court, and an especially important function when the lower courts are applying different tests and reaching different results over the same question and virtually-identical fact patterns.

Third, in addition to the customary requests for uniformity that a deep conflict in the lower courts prompts, the issue here has led to uncertainty even for residents in the same State. The Ninth Circuit and the California Supreme Court have long charted different paths in answering this specific-jurisdiction question. *See, supra*. So too, more recently, have the First Circuit and the Supreme Judicial Court of Massachusetts. *See, supra.* Even Shoppers itself has faced different resolutions of this issue. While the District of Columbia Court of Appeals seized jurisdiction over this case, the federal district court has declined jurisdiction on virtually identical facts. *See Duffy v. Shoppers Food Warehouse MD Corp.*, No. 93-2372 (D.D.C.); *see also Bayles v. K-Mart Corp.*, 636 F.Supp. 852 (customer's slip-and-fall claim did not "aris[e] from" corporation's advertising in District of Columbia media and therefore specific jurisdiction could not constitutionally be exercised over the corporation). No one litigant and the residents of no one State should have to face such unpredictable consequences stemming from precisely the same conduct.

Fourth, by embracing a "discernible relationship" or "related to" test that does not require a causative connection between the defendant's forum contacts and the plaintiff's injury, the lower court threatens to diminish, if not entirely collapse, the Court's distinction between "specific" and "general" jurisdiction. General jurisdiction, recall, deals with situations in which the complaint does not arise from the defendant's forum contacts but the defendant's contacts with the forum are so "continuous and systematic" that due process permits personal jurisdiction over any cause of action involving the defendant. An interpretation of the Due Process Clause, however, that allows specific jurisdiction whenever a court finds some "discernible relationship" between the injury and the defendant's forum contacts will make resort to this Court's general jurisdictional inquiry utterly unnecessary and will eventually make the doctrine a quaint artifact of constitutional law. The failure of the lower court here, and in many other courts, to preserve this vital distinction also merits review.

III. This Case Presents An Appropriate Vehicle For Resolving A Pressing Jurisdictional Issue.

This petition squarely presents an opportunity to resolve a conspicuously open question in the Court's personal jurisdiction cases: Must there be a causal relationship between the defendant's forum contacts and the plaintiff's complaint to assert specific jurisdiction over the defendant? Here, the plaintiff did not see (and accordingly did not rely upon) the defendant's Washington Post advertisements in choosing to visit the Shoppers' store in Maryland. Pet. App. 4a, 18a. The only way that specific jurisdiction could exist on this record, as a result, was through some form of "related to" test that did not have a cause-and-effect element. Ultimately, that is precisely the test the lower court adopted; it is precisely the test that Justice Brennan advocated in dissent in *Helicopteros*; and it is precisely the test the majority acknowledged but did not have occasion to address in *Helicopteros*.

The case also presents an opportunity to resolve the question in a context in which it most frequently arises. As shown above, all manner of retailers frequently advertise in jurisdictions where they have no stores or any other meaningful presence, and accordingly frequently face the question whether a personal injury on their premises arises from these advertising activities.

Lastly, it makes no difference that this petition involves a federal question arising in the District of Columbia courts. Although enacted by Congress, the District's long-arm statute is modeled after the Virginia and Maryland long-arm statutes, and like most long-arm statutes, is designed to be co-extensive with the reach of the Due Process Clause. Pet. App. 10a, 18a. No doubt the validity of this interpretation of the District's long-arm statute is governed by the Due Process Clause of the Fifth Amendment, not that of the Fourteenth Amendment. But that difference has not precluded the Court from reviewing the constitutionality of government conduct in the District in the past. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Nor, at any rate, has plaintiff argued in this case that the minimum contacts inquiry in specific-jurisdiction cases differs depending on whether the Fifth or Fourteenth Amendment is invoked by the nonresident defendant.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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April 2000

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

SHOPPERS FOOD WAREHOUSE, Appellant,
v.
Asuncion MORENO, Appellee.

No. 96-CV-21.

Decided Feb. 17, 2000.

Before WAGNER, Chief Judge, TERRY, STEADMAN, SCHWELB, FARRELL, RUIZ and REID, Associate Judges.

ON REHEARING EN BANC

REID, Associate Judge:

The main issue presented by this case is whether the trial court had personal jurisdiction over appellant, a Maryland corporation which extensively advertised its grocery stores in the District of Columbia's major circulation newspaper and other communications media, where appellee, a District resident, alleged in a negligence "slip and fall" lawsuit that she suffered personal injuries in one of appellant's Maryland stores located near the District's borders. The trial court concluded that it had personal jurisdiction over appellant, and a jury awarded appellee damages for her injuries. A majority panel of this court affirmed the trial court in an opinion issued on July 16, 1998, *Shoppers Food Warehouse v. Moreno*, 715 A.2d 107 (D.C.1998) (*Moreno I*). The panel's opinion was vacated and Shoppers' petition for rehearing en banc was granted on January 4, 1999. 722 A.2d 845 (D.C.1999). After rehearing en banc, which we granted only to consider the jurisdictional

issue,[1] we reaffirm the trial court's judgment. We hold that the trial court properly exercised personal jurisdiction because appellant, through its extensive advertising activity in a major District of Columbia newspaper, purposefully solicited District residents as customers for its nearby Maryland and Virginia stores and thus transacted business in the District; and further, because Ms. Moreno's claim had a discernible relationship to its advertising, Shoppers could have reasonably anticipated being haled into court to defend against a personal injury suit brought by a District resident.

I.

FACTUAL SUMMARY

A District of Columbia jury found that on November 20, 1993, appellee Asuncion Moreno slipped and fell on okra in a grocery store owned by appellant Shoppers Food Warehouse, a Maryland corporation ("Shoppers"), and as a result of Shoppers' negligence, sustained back and hand injuries. She was awarded damages in the amount of $197,307 for past and future medical expenses, mental anguish, and pain and suffering. From the beginning of Ms. Moreno's lawsuit, Shoppers argued that, contrary to Ms. Moreno's position, the trial court lacked personal jurisdiction over it under D.C.Code § 13-423(a)(4) (1995) (causing tortuous injury in the District of Columbia).[2] Later, Ms. Moreno claimed that even if

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[1] We leave intact the division's disposition of the remaining issues on appeal. *See Moreno I*, 715 A.2d at 111-12.

[2] In relevant part, D.C.Code§ 13-423 states as follows:

> (a) A District of Columbia Court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—
>
> (1) transacting any business in the District of Columbia;
>
> * * *

jurisdiction were not based on subsection (a)(4), it rested on § 13-423(a)(1) (transacting any business in the District of Columbia). She pointed out that Shoppers placed extensive ads in The Washington Post, a major District of Columbia newspaper, soliciting customers to its stores in Maryland and Virginia. Indeed, the record on appeal is replete with pages of weekly Shoppers' advertisements in The Washington Post between the period October 6, 1993 and December 1, 1993, including November 20, the date on which Ms. Moreno alleged that she fell. The ads for Shoppers' Maryland and Virginia stores contained pictures and prices of produce, meats, canned goods, beverages, candies and other packaged goods.[3] The Shoppers' store where Ms. Moreno was injured is located in Takoma Park, Maryland, within two miles of her home in the District of Columbia.

Shoppers maintained that § 13-423(a)(4) did not apply because no tortious injury took place in the District. Furthermore, Shoppers argued that Ms. Moreno failed to show the applicability of § 13-423(a)(1) which, it asserted, must be read in conjunction with § 13-423(b). It also pointed out that Shoppers is a Maryland Corporation having its principal place of business in Maryland; the store in which Ms. Moreno shopped is located in Maryland; and Ms. Moreno provided no

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> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;
>
> * * *
>
> (b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

[3] Additional information regarding the ads appears in the analysis section of this opinion.

affidavit showing that she actually saw the Washington Post advertisements.

In its order of June 22, 1994, the motions court agreed with Shoppers that subsection (a)(4) was inapplicable because Ms. Moreno's injury occurred in Maryland, not the District. However, the court concluded that there was personal jurisdiction under subsection (a)(1) for the following reasons:

> First, it is reasonable to require the Defendant to defend this suit in the District of Columbia.... The Defendant owns numerous stores in Maryland and Virginia, several of which are located within a few miles of the District of Columbia border.... The Defendant contracts with and advertises in [T]he Washington Post, thereby targeting and soliciting customers in the District of Columbia area .... Furthermore, the Defendant has failed to "show that it [is] at a 'severe disadvantage' in being required to defend in [the District of Columbia];" *Tom Brown & Co. v. Francis*, 608 A.2d 148, 152 (D.C.1992) (quoting *Electronic Media Int'l v. Pioneer Communications, Inc.*, 586 A.2d 1256, 1258 (Me.1991)[]]. Since the Plaintiff resides in the District, she has a strong interest in litigating this suit here.
>
> Second, the Defendant, by contracting with Washington based businesses (i.e., The Washington Post, the District of Columbia Yellow Pages) for adverti[s]ing purposes, has transacted business in the District of Columbia. Thus, the Defendant purposefully and voluntarily availed itself of the privileges and protections of the District of Columbia....
>
> Finally, the Defendant's contacts with the forum state were of such quality and nature that it is reasonable for the Defendant to reasonably anticipate being haled into court in the District of Columbia. It is reasonable to conclude that the Defendant derives a substantial portion

of its revenue from District of Columbia residents—it specifically targets with advertisements that demonstrate how the Defendant's prices compare favorably with the prices in supermarkets.

Although the motions court did not explicitly mention § 13-423(b) in its June order, it referenced a prior trial court opinion, *Daniels v. Kanof*, 116 Daily Wash. L. Rptr. 2053, 2057 (Super.Ct.1988), involving an advertisement in the District by a nonresident corporation. That opinion stressed "the foreseeability of injury to District of Columbia plaintiffs as a result of defendant's actions and the consequences of its actions by soliciting and advertising for business in the District of Columbia."[4] Accordingly, the trial court "conclude[d] that there are enough contacts with the District of Columbia in this case to satisfy the minimum contacts requirement."

II.

ANALYSIS

Personal Jurisdiction

This court has never determined whether newspaper and other advertisements in the District by a nonresident corporation owning a chain of stores, some of which are located in very close proximity to the District's borders, are sufficient to meet the minimum contacts requirement of the District's long-arm statute, and whether the advertising constitutes a sufficient nexus for the District's exercise of personal jurisdiction over a nonresident defendant in a personal injury lawsuit where the injury took place in a store in a neighboring jurisdiction. Trial courts in the District that have

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[4] *Daniels* also concluded that "defendant's activities, *i.e.*, the advertising and soliciting for business which presumably has attracted this plaintiff, as well as many other District of Columbia residents to its stores, clearly has caused a consequence in the District, *i.e.*, plaintiff's injuries." 116 Wash. L. Rptr. at 2057.

examined this issue have disagreed. Judges in both the Superior Court of the District of Columbia and the United States District Court for the District of Columbia have expressed different views at different stages of cases involving Shoppers as a defendant.[5]

Survey of Supreme Court Decisions and Past Decisions of this Court

Our consideration of this difficult matter begins with a review of past Supreme Court decisions and the past decisions of this court which have interpreted § 13-423(a)(1) and (b). The review will assist us in determining whether the trial court's exercise of personal jurisdiction in this case satisfies the "minimum contacts" requirement of the due process clause, and whether the requirement of § 13-423(b)— that a claim for relief under § 13-423(a)(1) must aris[e] from acts enumerated [in § 13-423(a)]—has been met.

In the early years after § 13-423 was enacted, decisions in our cases were guided both by Supreme Court precedent and also by then existing Maryland and Virginia law. We look first at early Supreme Court cases that shaped our initial decisions under § 13-423(a)(1). *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the seminal decision, held that, in keeping with " 'traditional notions of fair play and substantial justice,' " there must be "minimum contacts" between the defendant and the forum state before personal jurisdiction can be exercised consistently with due

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[5] The differences in the views of the judges are reflected in the orders of June 22, 1994, and December 15, 1995, in this case; in *Duffy v. Shoppers Food Warehouse*, No. Civ. A. 93-2372, 1994 WL 151204, at *3 (D.D.C. Apr 14, 1994), and in the order of July 31, 1995, transferring the matter to the United States District Court for the District of Maryland.

process.[6] *Id.* at 316, 66 S.Ct. 154 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). At the same time, *International Shoe* emphasized that when a defendant seeks and "enjoys the benefits and protection of the laws" of the forum state, the defendant may face "obligations [which] arise out of or are connected with the [defendant's] activities within the [forum] state." *Id.* at 319, 66 S.Ct. 154 (citations omitted). Under these circumstances, requiring a defendant "to respond to a suit ... [in the forum state] in most instances, hardly [can] be said to be [an] undue [burden]." *Id.*

Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), further refined the required nexus. A plaintiff's unilateral activity in relation to a defendant cannot alone sustain personal jurisdiction under the "minimum contacts" theory. *Id.* at 253, 78 S.Ct. 1228. Rather, the Court held, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State ...." *Id.* In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), a shareholder's derivative action, and *Kulko v. Superior Court of California*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978), a domestic relations matter, the Supreme Court reiterated the "fairness" and "reasonableness" theme sounded in *International Shoe*. One of the indices of "fairness" and "reasonableness" of the exercise of personal jurisdiction by the forum state is whether the defendant " 'purposefully availed [itself]' of the 'benefits and protections' " of the forum state's laws, *Kulko, supra*, 436 U.S. at 94, 98 S.Ct. 1690 (citing *Shaffer, supra*, 433 U.S. at 216, 97 S.Ct. 2569 (footnote

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[6] "[D]ue process requires ... that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe, supra*, 326 U.S. at 316, 66 S.Ct. 154 (citations omitted).

omitted)), and thus, "could reasonably have anticipated being 'haled before a ... court' " in that jurisdiction. *Id.* at 97-98, 98 S.Ct. 1690 (quoting *Shaffer, supra*, 433 U.S. at 216, 97 S.Ct. 2569 (footnote omitted)). *Kulko* also examined whether there was a "sufficient connection" between the defendant and the forum state by determining "whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State." *Id.* at 92, 98 S.Ct. 1690. Part of the answer depended on whether the defendant "purposefully derive[d] benefit from any activities relating to the [forum state]." *Id.* at 96, 98 S.Ct. 1690.

The first of our significant cases decided under § 13-423(a)(1), *Environmental Research Int'l, Inc. v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808 (D.C.1976) (en banc), not only articulated the aforementioned principles from Supreme Court cases, but also demonstrated that Congress intended the District's long-arm statute, like the corresponding statutes in Maryland and Virginia, to be coextensive in reach with the exercise of personal jurisdiction permitted by the due process clause. Specifically, we stated that:

> [t]he legislative history of [the District's long-arm statute] makes it clear that it was Congress' intent to provide the District with a long-arm statute equivalent in scope to those already in effect in Maryland and Virginia.... In interpreting their statutes, the courts of both Maryland and Virginia have concluded that they permit the exercise of personal jurisdiction over nonresident defendants to the extent permitted by the due process clause of the United States Constitution.

Id. at 810-11 (footnotes omitted). We then stated: "We reach a similar conclusion as to our statute." *Id.* at 811. We "note[d] the trend toward liberalization of jurisdictional limitations" and the fact that "[e]ven a small amount of

in-jurisdiction business activity is generally enough to permit the conclusion that a nonresident defendant has transacted business here." *Id.*[7]

Although our earliest cases did not focus much on § 13-423(b), we had occasion to interpret that provision in *Cohane v. Arpeja-California, Inc.*, 385 A.2d 153 (D.C.1978), *cert. denied*, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978), where we explained:

> The limitation in § 13-423(b) that the claim for relief must arise from the transaction of business in the District of Columbia is meant to prevent "the assertion of claims in the forum state that do not bear some relationship to the acts in the forum state relied upon to confer jurisdiction." *Malinow v. Eberly*, 322 F.Supp. 594, 599 (D.Md.1971). Once, however, the claim is related to acts in the District, § 13-423 does not require that the scope of the claim be limited to activity within this jurisdiction.

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[7] *See also Bueno v. La Compania Peruana de Radiodifusion, S.A.*, 375 A.2d 6, 8 (D.C.1977) (focusing upon whether the defendant had engaged in some "purposeful, affirmative activity within the District of Columbia") (citations omitted).

Id. at 158-59.[8] Thus, under *Cohane*, if a claim is "related to [defendant's] acts in the District," the requirement of § 13-423(b) is met. We applied the same "relate to" principle in *Berwyn Fuel, Inc. v. Hogan*, 399 A.2d 79, 80 (D.C.1979), where we also made explicit the principle recognized in *Lockwood Greene, supra*, that § 13-423 "permits a jurisdictional reach coextensive with that permitted by the due process clause." *Id.* at 80 (citing *International Shoe, supra*, 326 U.S. at 310, 66 S.Ct. 154; *Cohane, supra*, 385 A.2d at 158). *Berwyn* reiterated that "[t]he only nexus required by [§ 13-423](a)(1) ... between the District of Columbia and the nonresident defendant is 'some affirmative act by which the defendant brings itself within the jurisdiction and establishes minimum contacts.' " *Id.* (quoting *Cohane, supra*, 385 A.2d at 158).

Between 1981 and 1983, after the Supreme Court decided *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), we determined that personal jurisdiction over nonresident defendants existed

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[8] In *Malinow, supra*, a decision of the United States District Court for the District of Maryland, the court discussed the (b) subsection of the then existing comparable Maryland long-arm statute which specified: "(b) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him." 322 F.Supp. at 597. The Maryland court stated:

> The drafters of the forebear of the Maryland statute ... would probably state that § 96(b) merely prevents the assertion of claims in the forum state that do not bear some relationship to the acts in the forum state relied upon to confer jurisdiction.... The Court in *McGee, [v. International Life Ins. Co.[,]* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957),] stated on page 223 of 355 U.S., [78 S.Ct. 199] that it was sufficient to confer jurisdiction constitutionally that the " * * * suit was based on a contract which had *substantial connection* with that State."

Id. at 599 (emphasis added in *Malinow*).

under our long-arm statute in four out of five cases.[9] *World-Wide Volkswagen* reaffirmed that "[t]he limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years." *Id.* at 292, 100 S.Ct. 559. It referenced the "fundamental transformation in the American economy" and "[t]he economic interdependence of the States," *id.* at 293, 100 S.Ct. 559, and highlighted two principles governing a due process analysis in personal jurisdiction cases: (1) "the foreseeability that is critical .... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"; and (2) "[w]hen a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' ... it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *Id.* at 297, 100 S.Ct. 559 (quoting *Hanson, supra*, 357 U.S. at 253, 78 S.Ct. 1228).

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[9] One of these cases, *AMAF Int'l Corp. v. Ralston Purina Co.*, 428 A.2d 849 (D.C.1981), was decided under D.C.Code § 13-334 pertaining to foreign corporations that "do" or transact business in the District. AMAF International, a District corporation, sued Ralston, a Missouri corporation for negligence and breach of contract relating to an order of 600 bags of poultry feed to be shipped to Nigeria. Ralston engaged in another type of business activity in the District—making sales of its products to local supermarkets. In reversing the trial court's dismissal of the complaint for lack of personal jurisdiction, we stressed a principle re-articulated in *World-Wide Volkswagen, supra*, " 'When a corporation purposefully avails itself of the privilege of conducting activities within the forum State, it has clear notice that it is subject to suit there.' " *AMAF International*, 428 A.2d at 851 (quoting *World-Wide Volkswagen, supra*, 444 U.S. at 297, 100 S.Ct. 559 (other citation and internal quotations omitted)).

World-Wide Volkswagen helped to guide our decisions in the cases decided between 1981 and 1983, the most significant of which were *Mouzavires v. Baxter*, 434 A.2d 988 (D.C.1981) (en banc); *Smith v. Jenkins*, 452 A.2d 333 (D.C.1982); and *Hummel v. Koehler*, 458 A.2d 1187 (D.C.1983). In addition to following previous announced principles, these cases clarified that "the most critical inquiry is not whether the nonresident defendant is physically present in the forum but whether the defendant's contacts with the forum are of such a quality and nature that they manifest a deliberate and voluntary association with the forum" and are not "fortuitous or accidental." *Mouzavires, supra*, 434 A.2d at 995, 997; *Smith, supra*, 452 A.2d at 337. *Mouzavires* also declared that § 13-423(a)(1) "embraces those contractual activities of a nonresident defendant which cause a consequence [in this jurisdiction]." 434 A.2d at 992. *And see Cockrell v. Cumberland Corp.*, 458 A.2d 716 (D.C.1983) (applying the "cause a consequence" principle).

Between 1984 and 1993, three important decisions were handed down by the Supreme Court: *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Discussion in *Keeton* centered on whether the minimum contacts requirement was met under New Hampshire's long-arm statute in a libel action brought by a resident of New York who sued an Ohio corporation, Hustler Magazine, Inc. in a federal court in New Hampshire. If those contacts are "random, isolated, or fortuitous," the Court stated, due process requirements are not satisfied. 465 U.S. at 774, 104 S.Ct. 1473. The only connection the Ohio corporation had with New Hampshire was the monthly sale of its magazine, issues of which contained the alleged libel that was the focus of the lawsuit. After reiterating the fairness and reasonableness principles governing the minimum contacts doctrine, the

Supreme Court reversed the trial court's dismissal of the complaint, saying in part: "Where, as in this case, respondent Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine." *Id.* at 781, 104 S.Ct. 1473 (citing *World-Wide Volkswagen, supra*, 444 U.S. at 297-98, 100 S.Ct. 559).

Helicopteros, supra, elucidated the distinction between general and specific jurisdiction in personal jurisdiction cases: (1) "[W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant," 466 U.S. at 414 n. 8, 104 S.Ct. 1868 (citation omitted); and (2) "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." *Id.* at n. 9 (citations omitted). *Burger King*, in turn, summarized the principles and policies relating to the due process clause and personal jurisdiction. First, the court rejected any "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction, 471 U.S. at 478, 485, 105 S.Ct. 2174, and reaffirmed that " 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.' " *Id.* at 485-86, 105 S.Ct. 2174 (quoting *Kulko, supra*, 436 U.S. at 92, 98 S.Ct. 1690). Second, "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [the] 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, *Keeton, supra*, 465 U.S. at 774, 104 S.Ct. 1473, and the litigation results from alleged injuries that 'arise out of or relate to' those activities, *Helicopteros, supra*, 466 U.S. at 414, 104 S.Ct. 1868." *Burger King, supra* note 8, 471 U.S. at 472.

Third, "[j]urisdiction is proper ... where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Id.* at 475, 105 S.Ct. 2174 (quoting *McGee, supra* note 8, 355 U.S. at 223, 78 S.Ct. 199 (other citation omitted)). Fourth, "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* at 477, 105 S.Ct. 2174. Finally, "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.* at 473, 105 S.Ct. 2174 (citing *McGee, supra* note 8, 355 U.S. at 223, 78 S.Ct. 199).

Our later decisions construing § 13-423 have been consistent with the teaching of the Supreme Court in these due process cases. *See, e.g., Salins, Inc. v. Sure Way Refrigerated Truck Transp. Brokers, Inc.*, 510 A.2d 1032 (D.C.1986); *Fisher v. Bander*, 519 A.2d 162 (D.C.1986); *Lex Tex Ltd. v. Skillman*, 579 A.2d 244 (D.C.1990); *Trerotola v. Cotter*, 601 A.2d 60 (D.C.1991). In *Fisher*, for example, we stressed three justifications for asserting jurisdiction. First, "[the District] has an interest in providing its residents with the opportunity to redress grievances inflicted by out-of-state defendants." 519 A.2d at 164. Second, "when out-of-state actors avail themselves of the benefits of contact within the forum [asserting jurisdiction], fairness requires that they be held accountable therein for the consequences of such activities." *Id.* Third, "the voluntary establishment of contacts within the forum [asserting jurisdiction] helps to assure that litigating within that [jurisdiction] would not impose an undue burden on the out-of-state party." *Id.* In *Trerotola, supra*, our focus was on § 13- 423(b), and the question was "whether, in the words of § 13-423(b), Cotter's 'claim for relief [arose] from acts enumerated in' any subsection of § 13-423—in this case in § 13-423(a)(1)." 601 A.2d at 63 (citing *Cohane, supra*, 385

A.2d at 158). Pointing out that "§ 13-423(b) bars claims 'unrelated to the acts forming the basis for personal jurisdiction [,]' " *id.* (citing *Willis v. Willis*, 211 U.S.App.D.C. 103, 106, 655 F.2d 1333, 1336 (1981)), we continued:

> For proper jurisdiction, therefore, the long-arm statute requires that the claim raised have a discernible relationship to the "business" transacted in the District .... The critical test is whether the nonresident's "conduct and connection with the forum state are such that he [or she] should reasonably anticipate being haled into court there." *World-Wide Volkswagen, supra*, 444 U.S. at 297, 100 S.Ct. 559, quoted in *Smith, supra*, 452 A.2d at 336.

Id. at 64. *See also Everett v. Nissan Motor Corp. in U.S.A.*, 628 A.2d 106, 107 (D.C.1993), (emphasizing "the seminal requirement that [the out-of- state defendant] must undertake 'some affirmative act by which the defendant brings itself within the jurisdiction and established minimum contact.' ") (quoting *Cohane*, supra, 385 A.2d at 158) (citation omitted).

Applicable Legal Principles Distilled From Prior Cases

Even though our survey of past decisions yields no case squarely on point, there are pertinent legal principles which may be distilled from these cases to guide our decision in the case before us: (1) section 13-423(a)(1) is coextensive in reach with the personal jurisdiction allowed by the due process clause of the United States Constitution; (2) there are no "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction under § 13-423(a)(1) and (b), and the facts of each case must be weighed against notions of fairness, reasonableness and substantial justice; (3) under the due process clause, the minimum contacts principle requires us to examine the quality and nature of the nonresident defendant's contacts with the District and whether those contacts are voluntary and deliberate or only random, fortuitous, tenuous

and accidental; (4) where a nonresident defendant has purposefully availed itself of the benefits and protections of the District in engaging in a business activity in the forum jurisdiction, it is fair and reasonable to expect it to anticipate being sued in that jurisdiction; (5) in examining the nonresident defendant's contacts with the District, the focus is placed on the relationship among the defendant, the forum and the litigation; (6) it is reasonable and fair for the District to exercise specific jurisdiction where a nonresident defendant has purposefully directed its activities at District residents, and claims against it by a District resident "arise out of *or* relate to," *Burger King*, 471 U.S. at 472, 105 S.Ct. 2174 (emphasis added), or have a "substantial connection" with, *McGee, supra* note 8, 355 U.S. at 223, 78 S.Ct. 199, the business transacted in the District; and (7) the District has a manifest interest in providing a convenient forum in which its residents may seek relief for injuries inflicted by the nonresident defendant, especially where litigation within the District would not impose an undue burden on the nonresident defendant.

We now turn to the application of these principles. However, we begin with the factual context of the case before us since "the facts of each case must [always] be weighed" against notions of fairness, reasonableness and substantial justice in ascertaining whether the court may exercise personal jurisdiction over a nonresident defendant, *Burger King, supra*, 471 U.S. at 485-86, 105 S.Ct. 2174 (internal quotation marks and citation omitted); and because " '[the focus is placed] on the relationship among the defendant, the forum and the litigation.' " *Keeton, supra*, 465 U.S. at 775, 104 S.Ct. 1473 (quoting *Shaffer, supra*, 433 U.S. at 204, 97 S.Ct. 2569) (other citations omitted).

Factual Context

Shoppers regularly solicits customers for its Maryland and Virginia stores by placing advertisements in the District of Columbia market through The Washington Post, the major

newspaper headquartered in Washington, D.C., and other communications media. The record shows extensive Shoppers' weekly advertisements in The Washington Post from October 6 through December 1, 1993, including the November 1993 date on which Ms. Moreno slipped and fell in a Shoppers' store. The weekly ads appeared with the bold caption "**SHOPPERS *TOTAL* WAREHOUSE PRICES ... *EVERYDAY!*** FEATURE PRICES IN EFFECT 7 FULL DAYS!" The body of the ads contained a description of the products for sale in bold letters with the price, and sometimes with a picture of the sale item. At the top of the ad some additional inducement to shop at Shoppers appeared. For example, the October 13 and November 3, 1993 ads for the periods October 13 through 19, and November 3 through 9, 1993, included an opportunity to win tickets to a Washington Redskins football game with an inducement to "see store for details." The ad for November 10 through 16 also offered an opportunity to meet several football players from the Redskins' team on November 23, 1993. In the middle of one of the pages containing the October 1, 1993 ad, Shoppers stated in bold letters: "**No Matter Where You Live ... It's Worth The Drive!**" The November 17 through November 25, 1993 ad pointed to the possibility that customers "could get a free Thanksgiving turkey or ham" if they collected enough coupons; in addition, the ad offered holiday postage stamps with a savings of ten cents on each book of twenty stamps.

All of Shoppers' advertisements in The Washington Post, including those covering the relevant week listed the addresses of its numerous stores located in Maryland and Virginia, including those in Takoma Park, Maryland. The record before us reveals that Shoppers also placed advertisements on television networks in the District, as well as listed one of its stores in the Yellow Pages of the C & P Telephone book in 1993-94. Together with her husband, sister and niece, Ms. Moreno, a District of Columbia resident, was engaged in

Thanksgiving shopping on Saturday, November 20, 1993, at one of Shoppers' Takoma Park stores within two miles of her home when she slipped and fell on okra and sustained personal injuries.[10]

Application of Legal Principles To Ms. Moreno's Case

Having set forth the factual context of Shoppers' contacts with the District and Ms. Moreno's presence in one of Shoppers' Maryland stores, we now analyze the due process issue in two parts. As the guiding principle for both parts of our analysis, we reiterate what we made plain in *Berwyn, supra*: "[Section] 13-423 ... permits a jurisdictional reach coextensive with that permitted by the due process clause." 399 A.2d at 80 (citations omitted); *see also Fisher, supra*, 519 A.2d at 163 ("We have held that [§ 13- 423(a)(1)] is co-extensive with the due process clause of the fifth amendment, and that its construction is subsumed by a due process analysis.") (citations omitted). Therefore, we examine, first, whether the threshold due process requirements have been satisfied in this matter. "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe, supra*, 326 U.S. at 316, 66 S.Ct. 154 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)) (other citations omitted). If the nonresident defendant's business contacts are "sufficiently continuous and systematic" within the forum jurisdiction, the court may exercise general jurisdiction, *Thomason v. Chemical Bank*, 234 Conn. 281, 661 A.2d 595, 599 (1995); *see also International Shoe, supra*, 326 U.S. at 318, 66 S.Ct. 154. If the business contacts within the forum jurisdiction are not

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[10] It is important to note that Ms. Moreno never claimed to have seen the Thanksgiving ad.

"sufficiently continuous and systematic," the court may assert specific jurisdiction "whenever the defendant 'has purposefully directed' [its] activities at residents of the forum, *Keeton, supra*, and the litigation [has] result[ed] from alleged injuries that '*arise out of* or relate to' those activities, *Helicopteros*, [*supra*, 466 U.S. at 414, 104 S.Ct. 1868][;] (Emphasis added.) *Burger King, supra*, 471 U.S. at 472-73, 105 S.Ct. 2174." *Thomason, supra*, 661 A.2d at 599.

The Minimum Contacts Requirement

"Even a small amount of in-jurisdiction business activity is generally enough to permit the conclusion that a nonresident defendant has transacted business here." *Lockwood Greene, supra*, 355 A.2d at 811. In this case, Shoppers placed extensive and substantial advertisements in The Washington Post over a continuous period of time, at least from October 1 through December 1. However, it is unnecessary to decide whether these business contacts were "sufficiently continuous and systematic" to confer general jurisdiction in this case, because we are satisfied that the trial court had specific jurisdiction over Shoppers.

Shoppers conducted "purposeful, affirmative activity within the District of Columbia," *Bueno, supra*, note 7, 375 A.2d at 8, by purposefully directing advertisements for its Maryland and Virginia stores at a potential customer base in the District of Columbia, even declaring "No matter where you live ... it's worth the drive" to Shoppers. *See Burger King, supra*, 471 U.S. at 472, 105 S.Ct. 2174. These advertisements are not random, fortuitous, accidental or attenuated, *see Keeton, supra*, 465 U.S. at 774, 104 S.Ct. 1473; nor are they too trivial to cause a consequence in the District, *see Cockrell, supra*, 458 A.2d at 717, or "too tenuous to satisfy" the minimum contacts requirement of the due process clause. *Everett, supra*, 628 A.2d at 108. Rather they are "of such a quality and nature that they manifest a deliberate and voluntary

association with [the District and its residents]." *Mouzavires, supra*, 434 A.2d at 995.

By placing pages of large, illustrated advertisements often in bold letters, with shopping incentives, in the District's major circulation newspaper, The Washington Post, Shoppers obviously solicited customers from the District for their stores in Maryland and Virginia, clearly "with the expectation" that District residents would purchase products sold in those stores. *See Burger King*, 471 U.S. at 473, 105 S.Ct. 2174. Consequently, Shoppers " 'purposefully avail[ed] itself of the privilege of conducting activities within the [District],' " *World-Wide Volkswagen, supra*, 444 U.S. at 297, 100 S.Ct. 559, and "should reasonably [have] anticipate[d] being haled into court [in the District]" by a customer from the District who received an injury in one of its Maryland stores. *Id.; see also Fisher, supra*, 519 A.2d at 163.

Fairness and Reasonableness of Exercising Jurisdiction in the District of Columbia

Shoppers had " 'fair warning' " that it could be sued by a District resident who slipped and fell in one of its stores. *Burger King, supra*, 471 U.S. at 472, 105 S.Ct. 2174; *Fisher, supra*, 519 A.2d at 163. By engaging in advertising that reached into the District and locating its stores with convenient access to customers from the District, Shoppers reasonably could have anticipated that these customers would shop at its stores and, once there, be subject to the same hazards as other customers, including a slip and fall like the one Ms. Moreno suffered. Shoppers therefore had "fair warning" that it could be sued in the home jurisdiction of the customers it courted. Under the circumstances, the District would have a " 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-[jurisdiction] actors." *Burger King, supra*, 471 U.S. at 473, 105 S.Ct. 2174. Nothing in the record before us indicates that defense of Ms. Moreno's action in the District constituted an undue burden on Shoppers.

Indeed, "the voluntary establishment of contacts within the forum [jurisdiction] helps to assure that litigating within that [jurisdiction] would not impose an undue burden on the out-of-state party." *Fisher, supra*, 519 A.2d at 164. The Metropolitan Washington, D.C. area functions, in many respects, as a unified legal and commercial community. Consequently, "when out-of-state actors avail themselves of the benefits of contact within the forum [jurisdiction]," as did Shoppers in soliciting customers from the District's population, "fairness requires that they be held accountable therein for the consequences of such activities." *Id.* We are satisfied, then, that the minimum contacts requirement of the due process clause has been met in this case. Shoppers transacted business in the District of Columbia within the meaning of D.C.Code § 13-423(a)(1).[11] Thus, jurisdiction in the Superior Court of the District of Columbia was proper, provided that Ms. Moreno established a nexus between her injury and Shoppers' advertisements in the District sufficient to satisfy § 13-423(b). We turn now to the second due process issue.

The Nexus Requirement

Section 423(b) states: "When jurisdiction over a person is based solely upon [§ 13-423], only a claim for relief arising from acts enumerated in this section may be asserted against him." The words "claim for relief arising from" also appear in § 13-423(a)(1): "A District of Columbia Court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a *claim for relief arising from* the person's (1)

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[11] Shoppers argues that "there is simply no evidence in the record from which any conclusion could be reached that Shoppers Food Warehouse MD Corp., the defendant, contracted for any of this advertising, or that it did so in the District of Columbia." However, the trial court could reasonably assume, in the absence of evidence to the contrary and evidence relating to the corporate structure of Shoppers, that the advertisements in the District for Shoppers' grocery stores in Maryland were placed by Shoppers Food Warehouse MD Corp.

transacting any business in the District of Columbia" (emphasis added). Supreme Court precedent and our case law have construed § 13-423(b)'s "arising from" requirement flexibly.

The requirement of a nexus between the plaintiff's claim and the defendant's business activities in the forum jurisdiction has been stated in the disjunctive: the claim for relief must "result[ ] from alleged injuries that 'arise out of *or* relate to' those activities." *Burger King, supra*, 471 U.S. at 472, 105 S.Ct. 2174 (quoting *Helicopteros, supra*, 466 U.S. at 414, 104 S.Ct. 1868) (emphasis added). Thus, if the claim either arises out of *or* relates to the nonresident defendant's business activity, specific jurisdiction may be exercised. Earlier, in considering an insurance contract case, *McGee, supra* Note 8, asserted: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [the forum] State." 355 U.S. at 223, 78 S.Ct. 199 (references omitted).

In *Cohane* and *Berwyn* we followed the "relate to" language. *Cohane, supra*, 385 A.2d at 158-59 (under § 13-423(b), "the claim [must be] related to acts in the District"); *Berwyn, supra*, 399 A.2d at 80 ("the claim must relate to the particular act or transaction forming the basis for personal jurisdiction"). In *Lex Tex, supra*, we fleetingly focused on the "arising out of" nexus language, rather than the words "relate to," in concluding that "one can hardly demand the right to come to the District of Columbia to pursue activities exclusively on behalf of an out-of-state principal and expect to be absolutely immune from suit here by that principal for causes of action arising directly out of the performance of such activities," 579 A.2d at 250. Most recently, in *Trerotola, supra*, we interpreted the nexus requirement of § 13-423(b) to mean only "that the claim raised [must] have a discernible relationship to the 'business' transacted in the District." 601 A.2d at 64 (citations omitted). We went on to explain that this "discernible relationship" is shown if "'certain minimum

contacts' between the nonresident and the forum" exist. *Id.* (quoting *World-Wide Volkswagen, supra*, 444 U.S. at 291, 100 S.Ct. 559). These minimum contacts reflect " 'conduct and connection with the forum state ... such that [the nonresident] should reasonably anticipate being haled into court there.' " *Id.* (quoting *World-Wide Volkswagen, supra*, 444 U.S. at 297, 100 S.Ct. 559). Stated differently, § 13-423(b) bars only "claims 'unrelated to the acts forming the basis for personal jurisdiction.'" *Id.* at 63 (quoting *Willis v. Willis*, 211 U.S.App.D.C. 103, 106, 655 F.2d 1333, 1336 (1981) (other citation omitted)). Section 13-423(b) thus operates as a due process check on the reach or scope of the "transacting business" provision of the long-arm statute.

Other jurisdictions have wrestled with the nexus requirement of specific jurisdiction in a variety of factual settings and have reached diverse conclusions as to the appropriate test for determining the proper nexus between the nonresident defendant's business activity and the claim asserted by the plaintiff. The tests adopted range from narrow or strict causation-based tests to more flexible relatedness tests requiring the showing of some connection or relationship between the claim and the business activity.

Into the strict, causation-based category fall the substantive relevance and proximate cause tests. These tests have sometimes been described as one test: substantive relevance/proximate cause. The substantive relevance test has been explained as follows:

> Under this test, for a cause of action to "arise from or relate to" a defendant's contacts with the forum state, the contacts must have substantive relevance to the cause of action. More plainly, the forum contacts must be necessary to the proof of the cause of action.

Mark M. Maloney, NOTE, *Specific Personal Jurisdiction and the "Arise From Or Relate To" Requirement ... What Does It*

Mean?, 50 WASHINGTON AND LEE LAW REVIEW 1265, 1282 (1993); *see also*, Lea Brilmayer, *How Contacts Count: Due Process Limitations On State Court Jurisdiction*, 1980 SUPREME CT. REV. 77. In *Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1259 (1st Cir.1990), the First Circuit summarized and applied the proximate cause test to affirm a federal trial court's dismissal of a negligence action for lack of personal jurisdiction: "Whether certain events 'arise out of' a nonresident defendant's actions within [the forum jurisdiction] is comparable or analogous to whether certain actions can be said to be the legal, or the proximate cause of injuries suffered by a plaintiff." *See also Peckham v. Continental Casualty Ins. Co.*, 895 F.2d 830, 836 (1st Cir.1990).

In a later case, *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 716 (1st Cir.1996), the First Circuit, desiring greater flexibility, deviated from its reliance on the proximate causation test, saying in part: "we intend to emphasize the importance of proximate causation, but to allow a slight loosening of that standard when circumstances dictate," and concluding in the wrongful death action that: "While the nexus between [the nonresident defendant's] solicitation of ... business [in the forum jurisdiction] and ... [the] death [of the plaintiff's wife, a Massachusetts' resident] does not constitute a proximate cause relationship, it does represent a meaningful link between [the nonresident defendant's] contact [with the forum jurisdiction] and the harm suffered." The court also stated, in language relevant to our case: "When a foreign corporation directly targets residents in an ongoing effort to further a business relationship, ... [t]he corporation's own conduct increases the likelihood that a specific resident will respond favorably." *Id.* at 715.

Other courts have rejected the substantive relevance/proximate cause test altogether. For example, in *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal.4th 434, 58 Cal.Rptr.2d 899, 926 P.2d 1085 (1996), the court stated:

"[A] proximate cause test ... is inconsistent with the fairness rationale underlying the specific jurisdiction doctrine. A person who purposefully avails himself or herself of the benefits of doing business in the forum state must be prepared to answer lawsuits that relate to his or her activity there." *Id.* at 1104 (referencing *Burger King, supra*, 471 U.S. at 472, 105 S.Ct. 2174); *see also* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 653-54 (1988) ("[T]he substantive relevance approach is not the best guide to dispute-specific jurisdiction" in part because "[t]he Supreme Court did not limit the specific jurisdiction quid pro quo rationale in *International Shoe* to claims 'directly arising out of' forum activities; it noted that due process would be satisfied 'in most instances' if the obligations arise out of *or are connected with* the activities within the state.") (footnote omitted).

The "but for" test has been adopted by other courts. In contrast to the First Circuit, for example, the Supreme Judicial Court of Massachusetts has rejected the substantive relevance/proximate cause test in favor of a "but for" test. See *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 625 N.E.2d 549, 553 (1994) ("There is no readily apparent basis in the statutory language ('arising from') for the restrictive proximate cause approach adopted by the First Circuit.") (Citation omitted). The "but for" test has been described as follows:

> [T]he general theory [of the "but for" test] is that a cause of action 'arises from or relates to' the defendant's forum state activities when "but for" those activities the cause of action would not have arisen. Therefore, if a plaintiff can trace the train of events leading up to the cause of action and find that the defendant's activities contribute to this chain, the cause of action is said to arise from those activities for the purposes of determining personal jurisdiction.

Maloney, *supra*, 50 WASHINGTON AND LEE LAW REVIEW at 1277 (footnotes omitted). In *Alexander v. Circus Circus Enterprises, Inc.*, 939 F.2d 847 (9th Cir.1991), the Ninth Circuit said: "[T]he critical focus in the 'arising out of' prong is whether, 'but for' the defendant's forum-related activities, the injury would have occurred; that is, whether the 'entire course of events ... was an uninterrupted whole which began with, and was uniquely made possible by, the [defendant's] contacts in the [forum state].' " *Id.* at 853 (quoting *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 384 (9th Cir.1990), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991)). The Supreme Court of California has rejected the "but for" test as probably "too lax" because "theoretically [it] may include any historical cause of the plaintiff's injuries," *Vons Companies, supra*, 58 Cal.Rptr.2d 899, 926 P.2d at 1106, and because it "is overly mechanical and fails to concentrate on the central issue presented by a motion to quash for lack of specific jurisdiction— that is, whether the defendant's forum contacts and plaintiff's claim are related sufficiently so that it is *fair* to subject the defendant to jurisdiction in the forum." *Id.* at 1108 (emphasis supplied); *see also* BRILMAYER, *supra*, 1980 Supreme Court Review at 84.

Two other nexus tests should be mentioned. As early as 1976, the Supreme Court of California applied the "substantial connection" test to determine whether the nexus requirement had been satisfied: "Our inquiry is directed to whether plaintiff's cause of action, based on an accident which resulted from defendant's allegedly tortuous act in Nevada, arises out of or has a substantial connection with a business relationship defendant has purposefully established with California." *Cornelison v. Chaney*, 16 Cal.3d 143, 127 Cal.Rptr. 352, 545 P.2d 264, 267 (1976). In 1995, after revisiting the issue of the proper nexus test and surveying other case law, the Supreme Court of California decided to retain its "substantial

connection" test as a flexible standard which best interprets the relatedness requirement. The court stated:

> A claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate. The due process clause is concerned with protecting nonresident defendants from being brought unfairly into court in the forum, on the basis of random contacts. That constitutional provision, however, does not provide defendants with a shield against jurisdiction when the defendant purposefully has availed himself or herself of benefits in the forum.

Vons Companies, supra, 926 P.2d at 1096. *See also Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 31 (Minn.1995) ("When a claim arises out of a contract that has a 'substantial connection' with the forum state, specific jurisdiction exists." (citing *McGee, supra* note 8, 355 U.S. at 223, 78 S.Ct. 199)).

The Supreme Court of Connecticut also articulated a flexible or less restrictive reasonably foreseeable standard in *Thomason, supra*, declaring:

> The words "arising out of" ... must be interpreted in a manner that reconciles the legislative decision to impose some limits on constitutionally permitted jurisdiction with its decision not to require a causal connection between the defendant's solicitation here and the plaintiffs' lawsuit. Our interpretation is as follows. For purposes of [the applicable Connecticut long-arm statutory provision], a plaintiff's "cause of action aris[es] ... out of ... business solicited in this state" if, at the time the defendant engaged in solicitation in Connecticut, it was reasonably foreseeable that, as a result of that

> solicitation, the defendant could be sued in Connecticut by a solicited person on a cause of action similar to that now being brought by the plaintiffs.

661 A.2d at 603.

Based upon our review of nexus tests used in other jurisdictions, the criticisms leveled at some of them, and the Supreme Court's admonition that there are no "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction, we see no reason to deviate from—and thus we reaffirm—our past decisions which have interpreted the "arise from" language of § 13-423(b) flexibly and synonymously with "relate to" or having a "substantial connection with," in the same way that the Supreme Court's due process analysis has used these terms interchangeably. This means that, for the Superior Court to have jurisdiction over Ms. Moreno's claim, the claim had to be related to or substantially connected with Shoppers' advertising activity in the District, *Cohane, supra*, 385 A.2d at 158; *Berwyn, supra*, 399 A.2d at 80; that is, as we said in *Trerotola, supra*, 601 A.2d at 64, it had to have some "discernible relationship" to Shoppers' advertising activity. Where Shoppers has deliberately and directly solicited District residents to become customers in its Maryland and Virginia stores, there can be no doubt that its advertising relates to or has a discernible relationship to a claim by a District resident who becomes a customer in one of Shoppers' stores and is injured. This is true because it is reasonably foreseeable that, as a result of advertising extensively and over a substantial period of time in the District's major circulation newspaper, Shoppers could be sued in the District on a claim similar to that filed by Ms. Moreno. *See Thomason, supra*, 661 A.2d at 603. The trial court found that Shoppers "owns numerous stores in Maryland and Virginia, several of which are located within a few miles of the District of Columbia border." The trial court also determined that Shoppers "contracts with and advertises in

[T]he Washington Post [and the Yellow Pages], thereby targeting and soliciting customers in the District of Columbia area." In doing so, it "voluntarily availed itself of the privileges and protections of the District of Columbia ...." Accordingly, the trial court concluded, Shoppers' "contacts with the [District] were of such quality and nature that it is reasonable for [it] to reasonably anticipate being haled into court in the District of Columbia."

Shoppers contends that in this case the nexus requirement is not satisfied because there is no inherent relationship between the duty breached (to provide a safe store) and the "transaction" of advertising in the District of Columbia media. Under this reading of the nexus requirement, Ms. Moreno would have to show something akin to false advertising by Shoppers. But since we require only a showing of a "discernible relationship" between the particular claim and the business transacted, Shoppers imposes too heavy a burden. *Trerotola*, 601 A.2d at 64. The record reveals extensive and repeated advertising by Shoppers in The Washington Post. In light of such advertising, Ms. Moreno's case is dissimilar to those in which plaintiffs based their jurisdictional claims on a single advertisement, or sporadic advertising from a travel agency located far from the forum state. *See, e.g., Crocker v. Hilton Int'l Barbados, Ltd.*, 976 F.2d 797, 799 (1st Cir.1992); *Witbeck v. Bill Cody's Ranch Inn*, 147 Mich.App. 587, 383 N.W.2d 253, 256 (1985), rev'd, 428 Mich. 659, 411 N.W.2d 439, 445 (1987).

Consistent with the trial court's conclusion, we hold that the trial court properly exercised jurisdiction in this matter because appellant, through its extensive advertising activity in a major District of Columbia newspaper purposefully and deliberately solicited District residents as customers for its nearby Maryland and Virginia stores and thus transacted business in the District; and further, because Ms. Moreno's claim was related to or had a discernible relationship to its

advertising, Shoppers could have reasonably anticipated being haled into court to defend against a personal injury suit brought by a District resident. In short, Ms. Moreno met the requirements of § 13-423(b).

Shoppers' Fear of Virtually Unlimited Jurisdiction

In its final argument Shoppers' raises the specter of "virtually unlimited jurisdiction in the District over businesses and claims with little or no relationship to the District." This is an argument without support in fact or law. *World-Wide Volkswagen, supra*, made clear that "the foreseeability that is critical ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297, 100 S.Ct. 559. Under our fact-driven analysis in this specific jurisdiction case, while Shoppers' advertising solicitation of customers from the District will support a slip and fall injury claim, vendors who sell their produce to Shoppers' stores—or, for that matter, a Shoppers' employee who slips and falls in a company warehouse in Maryland—are not within the class solicited by Shoppers' extensive advertising in The Washington Post. Moreover, non-directed Internet advertising might present a different factual situation from the one before us. *See E-Data Corp. v. Micropatent Corp.*, 989 F.Supp. 173, 177 (D.Conn.1997) (defendant's Internet advertising that had "the potential to reach ... Connecticut consumers" was insufficient as a basis for personal jurisdiction because "hundreds of thousands of Web sites [existed] on the Internet").

"[W]here a defendant who purposefully has directed [its] activities at forum residents seeks to defeat jurisdiction, [it] must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King, supra*, 471 U.S. at 477, 105 S.Ct. 2174. Shoppers has not presented a compelling case that the District now will exercise unlimited jurisdiction over businesses.

Judge Schwelb's dissent, for its part, appears to depend entirely on the distinction between Ms. Moreno and a hypothetical plaintiff who could testify, "Yes, I've seen Shoppers' ads, they've got great prices!" Such testimony presumably would support the inference he believes necessary that the plaintiff was actually induced to visit a Shoppers store by the advertising. Insistence on whether the plaintiff saw the ads in question shifts the focus of the due process inquiry away from where the Supreme Court has placed it, on the defendant's actions. Furthermore, it minimizes the importance and purpose of the long-arm statute, which we have always understood to afford District residents broad access to our courts limited only by due process considerations.

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

So ordered.

WAGNER, Chief Judge, dissenting:

The mere fact that a foreign corporation advertises for business within the District Columbia is insufficient under our long-arm statute for our local court to exercise personal jurisdiction over that corporation for claims unrelated to that advertising which arise wholly in the foreign state.[1] Since the majority appears to hold otherwise, I respectfully dissent. In order for the District of Columbia Courts to properly assert personal jurisdiction over a foreign corporation, "service of process over the nonresident must be authorized by statute and

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[1] There is no contention in this case that the court's jurisdiction derives from D.C.Code § 13-334 (1995) (authorizing service upon a foreign corporation doing business in the District of Columbia or transacting business in the District arising out "of contracts entered into or to be performed, in whole or in part, in the District of Columbia or growing out of any tort committed in the District"), or D.C.Code § 13-422 (pertaining to jurisdiction over corporations organized under the laws of, or maintaining a principal place of business in the District, as to any claim).

be within the confines of the due process clause of the United States Constitution." *Cohane v. Arpeja-California*, Inc., 385 A.2d 153, 158 (D.C.), *cert. denied*, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). The statutory provisions at issue here are D.C.Code §§ 13-423(a)(1) and -423(b) (long-arm statute).[2] There is no real dispute in this case that Shoppers Food Warehouse's (Shoppers') advertisements for customers within the District were sufficient minimum activities to meet the "transacting business" requirement of § 423(a)(1). *See Trerotola v. Cotter*, 601 A.2d 60, 63 (D.C.1991) (citing *Cohane*, 385 A.2d at 158).[3] What divides the court is whether the further condition imposed by § 13-423(b) is satisfied. I agree with my dissenting colleagues that it is not. Section 423(b) bars the exercise of jurisdiction over a foreign corporation where the claim is unrelated to the business transacted in the District by the corporation. *See Trerotola*, 601 A.2d at 63. In other words, under this section, "jurisdiction is limited to claims arising from the particular transaction of business which provides the basis for jurisdiction." *Cohane*, 385 A.2d at 158 (citing D.C.Code § 13- 423(b)). Ms. Moreno's claim arose out of injuries she

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[2] The long-arm statute, § 13-423 provides in pertinent part:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's -
> (1) transacting any business in the District of Columbia;
>
> * * *
>
> (b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

[3] "Under § 13-423(a)(1), less of a nexus between the defendant and the District of Columbia is required for a finding of jurisdiction than would be required under the 'doing business' test used to determine corporate presence." *Cohane, supra*, 385 A.2d at 158 (citation omitted).

sustained in an accident which occurred in Shoppers' Maryland store as a result of Shoppers' negligent act or omission in the state of Maryland. There is simply no relationship here between Shoppers' advertisements in the District and Shoppers' alleged tortious conduct which caused Ms. Moreno to slip and fall in Maryland as required by our statute. To accept the contrary position would render the limitation imposed by § 423(b) a nullity. That we have "interpreted this statute as permitting the exercise of personal jurisdiction over nonresident defendants to the extent permitted by the due process clause,"[4] does not eliminate the requirement that the courts of this jurisdiction adhere to the process due under our statute. That process, as set forth in our long-arm statute, provides in § 423(a)(1) and (b) a specific basis for the court's exercise of personal jurisdiction over a foreign corporation. The exercise of that jurisdiction must conform to the statute and be consistent with due process. *See Trerotola*, 601 A.2d at 64; *Cohane*, 385 A.2d at 158. Under § 13- 423(b), unless the claim "has a discernible relationship to the 'business' transacted in the District[,] ... asserted jurisdiction exceeds the limits of the due process clause of the Constitution." *Trerotola*, 601 A.2d at 64 (citing *Cohane*, 385 A.2d at 158). Here, there was only the fortuity of Ms. Moreno having an accident in a store in Maryland belonging to Shoppers, a foreign corporation which happens to advertise for customers in a daily newspaper which is distributed in the metropolitan area. Her cause of action neither arises out of, nor is it related to Shoppers' advertising activities. For these reasons, and essentially for those set forth in Judge Schwelb's dissenting opinion, I respectfully dissent from the opinion of the court.

SCHWELB, Associate Judge, with whom STEADMAN, Associate Judge, joins, dissenting:

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[4] *Cohane, supra*, 385 A.2d at 158.

When this case was before the division, I explained in some detail why, in my view, Ms. Moreno has failed to establish that her claim "ar[ose] from" Shoppers' contacts with the District of Columbia. *See Shoppers Food Warehouse v. Moreno*, 715 A.2d 107, 112-16 (D.C.1998) (*Moreno I*) (dissenting opinion). I pointed out that "[s]o far as we can discern from the record, Ms. Moreno would have suffered the injuries for which she seeks compensation in this action even if Shoppers had not advertised in the District at all." *Id.* at 113. The suggestion that Ms. Moreno's claim "arises from" Shoppers' advertising, when she would have sustained her injuries even in the absence of a single ad, ascribes a distinctly odd meaning to the rather straightforward statutory language. I continue to adhere to the position I took in *Moreno I*, and rather than burdening a second volume of the Atlantic 2d Reporter with the same dissenting prose, I incorporate by reference my separate opinion at the division level. Because the en banc majority now invokes the legislative history of our long-arm statute, D.C.Code § 13-423(b) (1995), as well as the case law of certain other jurisdictions, I think it appropriate to add the following observations to the views expressed in my opinion in *Moreno I*.

I.

In its discussion of the issue presently before us, the court surveys a plethora of federal and local decisions, and correctly notes that there is no District of Columbia case "squarely on point." See maj. op. at 329. But as the majority points out, "[t]he legislative history of the District's long arm statute makes it clear that it was Congress' intent to provide the District with a long-arm statute equivalent in scope to those already in effect in Maryland and Virginia." *Id.* at 326 (quoting *Environmental Research Int'l Inc. v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808, 810 (D.C.1976) (en banc)). The legislature having focused on Maryland and Virginia, we should surely explore the construction by courts in these

neighboring jurisdictions of the statutes on which our own legislation was based.

Maryland's specific jurisdiction long-arm statute is identical to the District's in all material respects. *See* Md. Code Ann. Cts. & Jud. Proc. § 6-103 (1994). The Maryland Court of Appeals has stated that in enacting the statute, the legislature intended "to expand the exercise of personal jurisdiction to the limits allowed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Camelback Ski Corp. v. Behning*, 307 Md. 270, 513 A.2d 874, 876 (1986) (*Camelback I*), *vacated and remanded on other grounds*, 480 U.S. 901, 107 S.Ct. 1341, 94 L.Ed.2d 512 (1987). The exercise of specific jurisdiction is permissible in Maryland if the suit arises out of, or is directly related to, the defendant's activities in the state. *See Camelback Ski Corp. v. Behning*, 312 Md. 330, 539 A.2d 1107, 1111 (1988) (*Camelback II*); *accord, Presbyterian Univ. Hosp. v. Wilson*, 337 Md. 541, 654 A.2d 1324, 1329-30 (1995); *Talegen Corp. v. Signet Leasing and Fin. Corp.*, 104 Md.App. 663, 657 A.2d 406, 410-11 (1995); *Piracci v. New York City Employees' Retirement Sys.*, 321 F.Supp. 1067, 1072 (D.Md.1971).[1] Although the Maryland cases do not specifically decide the question presented to us here, I think it unlikely that, in the absence even of a "but for" connection between Shoppers' advertising and Ms. Moreno's accident, the Maryland courts would conclude either that the plaintiff's injury "arose from" Shoppers' activities in the District or that it was "directly related" to them.

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[1] In *Camelback I*, 513 A.2d at 881 n. 7, the court left open the questions whether the terms "arising out of" and "related to" have different meanings and, if they do, whether specific jurisdiction may be asserted where the plaintiff's claim relates to, but does not arise out of, the defendant's activities in Maryland.

Ms. Moreno's prospects would be even less promising under Virginia law. That state's long-arm statute is also identical to the corresponding District provision in all material respects. *See* Virginia Code § 8.01- 328.1(A)-(B) (1992). In construing the extent of *in personam* jurisdiction under Virginia's long-arm statute, the Supreme Court of Virginia, much like its counterparts in the District and in Maryland, has stated that the legislative purpose was "to assert jurisdiction over nonresidents who engage in some purposeful activity in this State to the extent permissible under the due process clause." *Kolbe, Inc. v. Chromodern Chair Co.*, 211 Va. 736, 180 S.E.2d 664, 667 (1971).

When jurisdiction is based solely on an out-of-state defendant's transaction of business in Virginia, the plaintiff's claim must arise from the business transacted in the state. *See* Virginia Code § 8.01-328.1(A)-(B). The United States District Court for the Eastern District of Virginia has interpreted the phrase "arising from" as follows:

> Plain meaning is the starting point in the analysis, and *"caused by" is the phrase's plain meaning*. Thus, it is evident that Virginia's General Assembly used the phrase "arising from" to require that there be a causal link between the acts relied on for personal jurisdiction and the cause of action asserted. Significantly, courts agree that *this causation element requires more than simple "but-for" causation; it requires something akin to legal or proximate causation*.

Chedid v. Boardwalk Regency Corp., 756 F.Supp. 941, 943 (E.D.Va.1991) (emphasis added) (*citing Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1259 (1st Cir.1990))[2];

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[2] In *Pizarro*, the court stated:

> Whether certain events "arise out of" a nonresident defendant's actions within Puerto Rico is comparable or analogous

see also City of Virginia Beach v. Roanoke River Ass'n, 776 F.2d 484, 487 (4th Cir.1985) ("[i]n order for a cause of action to arise from business transacted in Virginia, the activities that support the jurisdictional claim must coincide with those that form the basis of the plaintiff's substantive claim"); *Verosol v. Hunter Douglas, Inc.*, 806 F.Supp. 582, 589-90 (E.D.Va.1992).[3]

In *Chedid*, the plaintiff slipped and fell in an elevator at a New Jersey casino. He brought a negligence action in a United States District Court in Virginia against the corporate owner of the establishment. The plaintiff argued that the court had jurisdiction over the defendant under Virginia's long-arm statute because the casino had solicited customers and placed ads in Virginia, and because his claim had arisen from these activities in the forum. Although the plaintiff alleged that the defendant's telephonic solicitation, in which it had offered free limousine travel to and from New Jersey, had induced him to go to the casino,[4] the court held that it did not have jurisdiction over the corporation, reasoning that there was no causal relationship between the plaintiff's accident and the corporation's transaction of business in Virginia. *Chedid, supra*, 756 F.Supp. at 943. "[P]laintiff's cause of action is one 'arising from' the defendant's alleged negligence in leaving the

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to whether certain actions can be said to be the legal, or proximate cause of injuries suffered by a plaintiff.

907 F.2d at 1259. It appears obvious to me that Ms. Moreno's fall was not proximately caused by Shoppers' advertising.

[3] It appears that the Virginia state courts have not yet addressed this issue. *See Chedid, supra*, 756 F.Supp. at 944.

[4] Unlike the plaintiff in *Chedid*, Ms. Moreno offered no evidence that she was induced to go to Shoppers Food Warehouse by Shoppers' advertising in the District. The court in *Chedid* thus went further than I find it necessary to go in order to conclude that jurisdiction was lacking in the present case.

elevator floor wet and slippery, not from defendant's wholly unrelated advertising and solicitation activities." *Id.*

The phrase "arising from" in the Virginia statute has thus been construed as requiring a strong causal link between the defendant's transaction of business in the state and the plaintiff's claim. No such causal link is alleged here. The common sense interpretation of the statutory language by the court in *Chedid* is fatal to Ms. Moreno's position in this case.

II.

In my opinion, the foregoing authorities render it most improbable that Ms. Moreno could prevail if the controversy were to be decided under the Maryland or Virginia statutes. The majority, however, has chosen not to look to Maryland or Virginia law, on which the District's statute was based, but to rely instead on precedents from Connecticut and California. But the cases from these jurisdictions were decided under statutes that differ significantly from the District's, and they therefore provide scant support for the majority's position.

In *Thomason v. Chemical Bank*, 234 Conn. 281, 661 A.2d 595, 601 (1995), the Supreme Court of Connecticut held that the phrase "arising out of" in the Connecticut long-arm statute "does not require a causal connection between the defendant's forum-directed activities and the plaintiffs' lawsuit." Connecticut's long-arm statute, however, provides that a suit must arise out of the defendant's contacts with the state in order to permit Connecticut's courts to exercise either general or specific jurisdiction. The court recognized that if the words "arising out of" were construed as imposing a causation requirement,[5] "the statute would limit our courts to

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[5] Significantly, the court explained:

> Some [federal] courts have suggested, in dicta, that specific jurisdiction may be exercised without proof of a causal connection between the defendant's forum-directed activities and the lawsuit.

the exercise of 'specific' jurisdiction and prohibit our courts from exercising any 'general' jurisdiction." *Id.* at 600-01. The court sensibly reasoned that the legislature had not intended to exclude general jurisdiction entirely, but had elected instead to enact a more restrictive test for general jurisdiction than the Constitution requires. *Id.* at 602. In fact, *Thomason* was brought and decided as a general jurisdiction case. *Id.* at 603-05.

Unlike the Connecticut statute, the District's general jurisdiction long-arm statute permits the Superior Court to exercise jurisdiction even if a plaintiff's claim does not arise out of an out-of-state defendant's activities in the forum. *See* D.C. Code § 13-334(a). Thus, *Thomason* is unhelpful to Ms. Moreno for two reasons: (1) unlike the Supreme Court of Connecticut, this court need not accord an artificially broad construction to the words "arising from" in the District's *specific* jurisdiction statute, for the Superior Court may exercise general jurisdiction without a showing that the claim arises from the defendant's activities in the forum; and (2) in *Thomason*, the court was construing the phrase "arising out of" as it appears in Connecticut's general jurisdiction long-arm statute, while Ms. Moreno brought her case solely under the District's specific jurisdiction statute.

> All of those courts, however, have based their conclusion on the fact that the specific jurisdiction test merely requires that the cause of action "arise out of *or relate to*" the defendant's forum-directed activities.... Thus, even if the constitutional test for specific jurisdiction does not require a causal connection between the defendant's contacts with the forum and the lawsuit, it is only because that test contains not only the "arising out of" language, but also the "relating to" language. *If the constitutional test employed only the "arising out of" language, a causal connection would be required.*

Id. at 600 n. 4 (emphasis added). The District's statute, of course, does not contain the words "relate to."

The majority also cites California's "substantial connection" test as support for the Superior Court's exercise of jurisdiction in this case. See maj. op. at 335. The Supreme Court of California has stated:

> A claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate. The due process clause is concerned with protecting nonresident defendants from being brought unfairly into court in the forum, on the basis of random contacts. That constitutional provision, however, does not provide defendants with a shield against jurisdiction when the defendant purposefully has availed himself or herself of benefits in the forum

Vons Cos. v. Seabest Foods, Inc., 14 Cal.4th 434, 58 Cal.Rptr.2d 899, 926 P.2d 1085, 1096 (Ca.1996).

Unlike its counterpart in the District, California's long-arm statute does not have an "arising from" requirement. Rather, California's long-arm statute states that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Code Civ. Proc. § 410.10 (1999). Thus, even if one were to assume that Ms. Moreno's claim has a "substantial connection" with Shoppers' activities in the District—a distinctly dubious assumption—the analysis in *Vons* sheds little light on the proper construction of the phrase "arising from" in § 13-423(b).

III.

There is a widespread perception in the community at large that lawyers and judges sometimes make things unnecessarily complicated. I suggest that if one were to tell an intelligent lay citizen that Shoppers advertised widely in the

District but that there was no evidence that Ms. Moreno ever read Shoppers' ads, and if one were then to ask that citizen whether Ms. Moreno had proved that her "slip and fall" accident "arose from" Shoppers' advertising, the interrogated individual would look at the questioner rather incredulously and then answer "of course not," or words to that effect. I believe that the result would be the same if this issue were posed to a professor of English. This is a case in which, in my judgment, the legal profession could profitably look at the problem as the average citizen would, and accord the words used by the legislature their common sense meaning.

I respectfully dissent.

DISTRICT OF COLUMBIA COURT OF APPEALS

SHOPPERS FOOD WAREHOUSE, Appellant,
v.
Asuncion MORENO, Appellee.

No. 96-CV-21.

Jan. 4, 1999.

Before WAGNER, Chief Judge, TERRY, STEADMAN, SCHWELB, FARRELL, RUIZ, and REID, Associate Judges.

ORDER

PER CURIAM.

On consideration of appellant's petition for rehearing en bane, and the answer thereto; and it appearing that the majority of the judges of this court has voted to grant the petition for rehearing en banc, it is

ORDERED that appellant's petition for rehearing en bane is granted and that the opinion and judgment of July 16, 1998, are hereby vacated. It is

FURTHER ORDERED that the Clerk shall schedule this matter for argument before the court sitting en bane as soon as the calendar permits. It is

FURTHER ORDERED that no later than February 1, 1999, the parties shall file new briefs specifically designed for consideration by and addressed to the en bane court. These new briefs shall address the analysis contained in the respective majority and dissenting opinions issued by the division. In addition, the new briefs shall incorporate all arguments that the parties wish to address to the en bane court and in that sense

shall be considered replacements for, not supplements to, the briefs submitted to the division. Each party shall file ten copies of its brief. The parties may subsequently file responsive memoranda not later than February 15, 1999.

DISTRICT OF COLUMBIA COURT OF APPEALS

SHOPPERS FOOD WAREHOUSE, Appellant,
v.
Asuncion MORENO, Appellee.

No. 96-CV-21.

Decided July 16, 1998.

Before SCHWELB, FARRELL, and REID, Associate Judges.

REID, Associate Judge:

The main issue presented by this case is whether the trial court had personal jurisdiction over appellant, a nonresident corporation which advertised its grocery stores in the District of Columbia communications media, where appellee, a District resident, alleged she suffered personal injuries in one of appellant's Maryland stores located near the District's border. The trial court concluded that it had personal jurisdiction over appellant. We affirm.

I.

FACTUAL SUMMARY

A District of Columbia jury found that appellee Asuncion Moreno slipped and fell in a grocery store owned by appellant Shoppers Food Warehouse MD Corporation and, as a result of Shoppers' negligence, sustained back and hand injuries. She was awarded damages in the amount of $197,307 for past and future medical expenses, mental anguish, and pain and

suffering.[1] From the beginning of Ms. Moreno's lawsuit, Shoppers argued that the trial court lacked personal jurisdiction over it under D.C.Code § 13-423(a)(4) (1995) (causing tortious injury in the District of Columbia).[2] Later, Ms. Moreno claimed that even if jurisdiction were not based on subsection (a)(4), it rested on § 13-423(a)(1) (transacting any business in the District of Columbia).

Shoppers maintained that § 13-423(a)(4) did not apply because no tortious injury took place in the District. Furthermore, Shoppers argued that Ms. Moreno failed to show the applicability of § 13-423(a)(1) which, they asserted, must be read in conjunction with § 13-423(b). In its order of June 22, 1994, the trial court agreed with Shoppers that subsection (a)(4) was inapplicable because Ms. Moreno's injury occurred in Maryland, not the District. However, the trial court

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[1] The breakdown of the jury award was: $6,307.00 for past medical expenses; $44,000 for past pain and suffering; $75,000 for future pain and suffering; $22,000 for past mental anguish; and $50,000 for future mental anguish.

[2] In relevant part, D.C.Code § 13-423 states as follows:

> (a) A District of Columbia Court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—
>
> (1) transacting any business in the District of Columbia;
>
> * * *
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;
>
> * * *
>
> (b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

concluded that there was personal jurisdiction under subsection (a)(1) for the following reasons:

> First, it is reasonable to require the Defendant to defend this suit in the District of Columbia.... The Defendant owns numerous stores in Maryland and Virginia, several of which are located within a few miles of the District of Columbia border.
>
> ... The Defendant contracts with and advertises in [T]he Washington Post, thereby targeting and soliciting customers in the District of Columbia area.... Furthermore, the Defendant has failed to "show that it [is] at a 'severe disadvantage' in being required to defend in [the District of Columbia]" ... (quoting *Electronic Media Int'l v. Pioneer Comm., Inc.*, 586 A.2d 1256, 1258 (Me.1991)[]]. Since the Plaintiff resides in the District, she has a strong interest in litigating this suit here.
>
> Second, the Defendant, by contracting with Washington based businesses (i.e., The Washington Post, the District of Columbia Yellow Pages) for adverti[s]ing purposes, has transacted business in the District of Columbia. Thus, the Defendant purposefully and voluntarily availed itself of the privileges and protections of the District of Columbia . . . .
>
> Finally, the Defendant's contacts with the forum state were of such quality and nature that it is reasonable for the Defendant to reasonably anticipate being haled into court in the District of Columbia. It is reasonable to conclude that the Defendant derives a substantial portion of its revenue from District of Columbia residents it specifically targets with advertisements that demonstrate how the Defendant's prices compare favorably with the prices in supermarkets . . . .

Although the trial court did not explicitly mention § 13-423(b) in its June order, it referenced a prior trial court opinion, *Daniels v. Knoff*, 116 Daily Wash.L.Rptr. 2053, 2057 (Super.Ct.1988), involving an advertisement in the District by a nonresident corporation. That opinion stressed "the foreseeability of injury to District of Columbia plaintiffs as a result of defendant's actions and the consequences of its actions by soliciting and advertising for business in the District of Columbia."[3] Accordingly, the trial court "conclude[d] that there are enough contacts with the District of Columbia in this case to satisfy the minimum contacts requirement."

Shoppers appeals on the basis that the trial court's order of June 22, 1994, constituted error because: (1) personal jurisdiction over it could not be based upon § 13-423(a)(1) and (b); (2) the trial court erred in denying its motion for a directed verdict; and (3) the trial court erred in permitting the jury to award damages for a permanent injury. We find no reason to disturb the trial court's judgment.

II.

ANALYSIS

A.

Personal Jurisdiction

This court has never determined whether newspaper and other advertisements in the District by a nonresident corporation owning a chain of stores, some of which are located in very close proximity to the District's borders, are sufficient to meet the minimum contacts requirement of the

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[3] *Daniels* also concluded that "defendant's activities, *i.e.*, the advertising and soliciting for business which presumably has attracted this plaintiff, as well as many other District of Columbia residents to its stores, clearly has caused a consequence in the District, *i.e.*, plaintiff's injuries." 116 Wash.L.Rptr. at 2057.

District's long-arm statute, and whether the advertising constitutes a sufficient nexus for the District's exercise of jurisdiction over a personal injury lawsuit where the injury took place in a store in a neighboring jurisdiction. Trial courts in the District that have examined this issue have disagreed. Different judges in both the Superior Court of the District of Columbia and the United States District Court for the District of Columbia have expressed different views at different stages of cases involving Shoppers as a defendant.[4]

We begin with certain fundamental principles that shape our opinion in this matter. First, in *Trerotola v. Cotter*, 601 A.2d 60 (D.C.1991), we said: " 'A court may properly assert personal jurisdiction over a nonresident [1] where a statute authorizes service of process and [2] where such service is consistent with due process.' " *Id.* at 63 (quoting *Smith v. Jenkins*, 452 A.2d 333, 336 (D.C.1982) (other citation omitted)). Thus, in accordance with the intent of Congress in enacting D.C.Code § 13-423, we must interpret that statute to "permit the exercise of personal jurisdiction over nonresident defendants to the extent permitted by the due process clause" of the Fifth and Fourteenth Amendments to the Constitution of the United States. *Environmental Research Int'l, Inc. v. Lockwood Greene Eng'rs, Inc.*, 355 A.2d 808, 810-11 (D.C.1976) (en banc); *see also Hummel v. Koehler*, 458 A.2d 1187, 1190 (D.C.1983); *Rose v. Silver*, 394 A.2d 1368, 1369 (D.C.1978).[5] Second, if " 'the defendant purposefully avails

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[4] The differences in the views of the judges are reflected in the orders of June 22, 1994, and December 15, 1995, in this case; in *Duffy v. Shoppers Food Warehouse*, CA No. 93-2372 (D.D.C.), 1994 WL 151204, at 3 and in the order of July 31, 1995, transferring the matter to the United States District Court for the District of Maryland.

[5] We have held previously that "the 'transacting any business' provision is coextensive with the due process clause." *Mouzavires v. Baxter*, 434 A.2d 988, 992 (D.C.1981) (en banc) (citations omitted), *cert. denied*, 455 U.S. 1006, 102 S.Ct. 1643, 71 L.Ed.2d 875 (1982); *see also Hummel*,

itself of the privilege of conducting activities within the [District], thus invoking the benefits and protections of its laws,' " *Smith, supra*, 452 A.2d at 336-37 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)),[6] and could " 'reasonably anticipate being haled into court [in the District],' " *Id.* at 336 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)), it "would [not] offend 'traditional notions of fair play and substantial justice'..." to "[allow] ... suit to be brought in the District of Columbia." *International Union of Elec., Salaried, Mach., and Furniture Workers v. Taylor*, 669 A.2d 699, 700 (D.C.1995) (citation omitted). Third, when jurisdiction is alleged based solely upon § 13-423, the nexus requirement set forth in § 13-423(b) must be met, that is to say, the claim for relief must "aris[e] from" one of the jurisdictional acts, such as "transacting business," enumerated in § 13-423.

We now turn to an application of the foregoing principles. We conclude that Shoppers' advertising in The Washington Post and the Yellow Pages, designed to target and attract District residents to its nearby Maryland and Virginia stores, amounted to transacting business in the District of Columbia under D.C.Code § 13-423(a)(1),[7] and that

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supra, 458 A.2d at 1190.

[6] "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

[7] Shoppers argues that "there is simply no evidence in the record from which any conclusion could be reached that Shoppers Food Warehouse MD Corp., the defendant, contracted for any of this advertising, or that it did so in the District of Columbia." However, the trial court could reasonably assume, in the absence of evidence to the contrary and evidence relating to the corporate structure of Shoppers, that the

jurisdiction was proper provided Ms. Moreno established a nexus between her injury and Shoppers' advertisements in the District sufficient to satisfy § 13-423(b).

Our case law has not construed § 13-423(b)'s "arising from" requirement restrictively. Most recently, for example, in *Trerotola, supra*, we interpreted that nexus to mean only "that the claim raised [must] have a discernible relationship to the 'business' transacted in the District." 601 A.2d at 64 (citations omitted). We went on to explain that this "discernible relationship" is shown if " 'certain minimum contacts' between the nonresident and the forum" exist. *Id.* (quoting *World-Wide Volkswagen Corp., supra*, 444 U.S. at 291, 100 S.Ct. 559). These minimum contacts reflect " 'conduct and connection with the forum state ... such that [the nonresident] should reasonably anticipate being haled into court there.' " *Id.* (quoting *World-Wide Volkswagen, supra*, 444 U.S. at 297, 100 S.Ct. 559). Stated differently, § 13-423(b) bars only "claims 'unrelated to the acts forming the basis for personal jurisdiction.' " *Id.* at 63 (quoting *Willis v. Willis*, 211 U.S.App.D.C. 103, 655 F.2d 1333, 1336 (1981) (other citation omitted)). Section 13-423(b) thus operates as a due process check on the reach or scope of the "transacting business" provision of the long-arm statute.

Here, the trial court found that Shoppers "owns numerous stores in Maryland and Virginia, several of which are located within a few miles of the District of Columbia border." The trial court also determined that Shoppers "contracts with and advertises in [T]he Washington Post [and the Yellow Pages], thereby targeting and soliciting customers in the District of Columbia area." In doing so, it "voluntarily availed itself of the privileges and protections of the District of Columbia...." Accordingly, the trial court concluded,

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advertisements in the District for Shoppers' grocery stores in Maryland were placed by Shoppers Food Warehouse MD Corp.

Shoppers' "contacts with the [District] were of such quality and nature that it is reasonable for [it] to reasonably anticipate being haled into court in the District of Columbia." Consistent with this conclusion, we hold that there is no jurisdictional bar to Ms. Moreno's claim because it has a "discernible relationship," *Trerotola, supra*, to Shoppers' advertising and soliciting of customers in the District of Columbia.[8] By advertising and soliciting customers in the District, Shoppers could reasonably anticipate being haled into court to defend against a personal injury suit brought by a District resident. In short, Ms. Moreno met the requirements of § 13-423(b).

Our dissenting colleague would require proof that Shoppers' extensive advertising in the District induced Ms. Moreno personally to shop at its Maryland store. No matter how much an advertiser saturates a locale, in the dissent's view, a jurisdictional link between advertising and predictable consumer response is not enough to meet § 13-423(b)'s requirement; plaintiff must show that *this* particular consumer responded to the solicitations, by proof at least, one supposes, that she was a regular reader of The Washington Post. Our

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[8] Shoppers contends that in this case the nexus requirement is not satisfied because there is no inherent relationship between the duty breached (to provide a safe store) and the "transaction" of advertising in the District of Columbia media. Under this reading of the nexus requirement, Ms. Moreno would have to show something akin to false advertising by Shoppers. Since *Trerotola* requires only a showing of a "discernible relationship" between the particular claim and the business transacted, Shoppers appears to impose a heavier burden on Ms. Moreno than *Trerotola* requires. *Id.* at 63-65. The record reveals extensive and repeated advertising by Shoppers in The Washington Post. In light of such advertising, Ms. Moreno's case is dissimilar to those in which plaintiffs based their jurisdictional claims on a single advertisement, or sporadic advertising from a travel agency located far from the forum state. *See, e.g., Crocker v. Hilton Int'l Barbados, Ltd.*, 976 F.2d 797, 800 (1st Cir.1992); *Witbeck v. Bill Cody's Ranch Inn*, 147 Mich.App. 587, 383 N.W.2d 253 (1985), *rev'd*, 428 Mich. 659, 411 N.W.2d 439 (1987).

decisions support no such restrictive gloss on § 13-423; as cases like *Trerotola* make clear, it requires only a practical link, consistent with due process, between the activity conducted in the jurisdiction (retail advertising) and the claim for relief (injury while shopping). Our colleague banishes to distinctly secondary status what for us are primary considerations embodied in § 13-423(b): the predictability that persons (D.C. residents) specifically solicited to shop in the advertiser's stores will do so, and the expectation reasonably imputed to the advertiser that relief for shopping-related injuries will be sought in the courts where those persons reside.

B.

The Motion For A Directed Verdict

Shoppers challenges the trial court's denial of its motion for a directed verdict. At the conclusion of Ms. Moreno's case, Shoppers moved for a directed verdict, contending there was "no evidence in the case that defendant created the condition" leading to Ms. Moreno's injury. However, Ms. Moreno introduced testimony from Ms. Brenda McCray showing that okra was on the floor of the produce section of the store on the day Ms. Moreno's injury occurred, and that Ms. McCray had notified a man in an apron, whom she regarded as a store employee, about the okra. He told her "that wasn't his department." In addition, Ms. McCray testified that she heard other people talking about the okra on the floor; and warned her mother, with whom she was shopping, to be careful. Ms. McCray saw Ms. Moreno fall and helped her up.[9] Ms. Moreno was shaking and crying. Ms. McCray observed "smashed okra" on the floor and on the back of Ms. Moreno's sweater. She testified it was the same okra about which she had warned the store employee.

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[9] Ms. McCray did not know Ms. Moreno.

In denying Shoppers' motion for a directed verdict, the trial court said, *inter alia*:

> [T]he Court is satisfied that there's enough evidence that a jury could infer that the person with the white apron putting apples on the cart, who said this is not my department is enough for [the jury] to conclude that he was an employee, so I'll deny that motion.

The trial court also denied Shoppers' renewed motion for a directed verdict at the conclusion of the defense case.

We see no basis on which to disturb the trial court's ruling.[10] It is well-settled that the determination of negligence is a factual issue. *See Barrett v. Harris*, 406 A.2d 1266, 1267 (D.C.1979); *American Marietta Co. v. Griffin*, 203 A.2d 710, 711 (D.C.1964). "When the case turns on disputed factual issues and credibility determinations, the case is for the jury to decide." *Durphy v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, 698 A.2d 459, 465 (D.C.1997) (citations omitted). Moreover, "[i]n assessing the legal sufficiency of the evidence, neither the appellate court nor the trial court may act as the trier of fact, and each must 'take care to avoid weighing the evidence, passing on the credibility of the witnesses, or substituting [its] judgment for that of the jury.' " *District of Columbia v. Perez*, 694 A.2d 882, 884 (D.C.1997) (quoting *Alliegro v. ACandS, Inc.*, 691 A.2d 102, 105 (D.C.1997)).

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[10] The focus of Shoppers' argument in the trial court as to the sufficiency of the evidence centered on whether there was notice to a store employee of the okra on the floor. On appeal, Shoppers argues: (1) "there was simply no evidence that [it] or its employees had caused the vegetable matter to be on the floor"; (2) the period of time between when Ms. McCray saw the okra on the floor and Ms. Moreno fell (thirteen to fifteen minutes) "is legally insufficient to establish 'constructive notice' on the part of Shoppers"; and that there is "no evidentiary basis for finding that [the man in the apron to whom Ms. McCray spoke,] was an employee of Shoppers...."

On the record before us, we conclude that reasonable jurors could reasonably find, by a preponderance of the evidence, that Shoppers received notice of the okra on the floor, and that Shoppers had time to clean up the okra prior to Ms. Moreno's fall. Accordingly, we do not disturb the jury's conclusion as to Shoppers' negligence.

C.

Permanent Injury Damages

Finally, Shoppers challenges the award to Ms. Moreno of damages for permanent injury. With respect to permanency, the trial court instructed the jury:

> In this case the plaintiff has offered evidence that as a result of the incident the plaintiff suffered personal injury with residual effects which [exist] to the present time. Although no physician or expert was called to give an opinion as to the expected duration of the injury, from the facts and circumstances in the case and from the nature and duration of the injury, you may, if you believe the evidence, infer that the plaintiff has suffered a permanent injury.

This charge was consistent with our case law. The trial court informed Shoppers that Ms. Moreno was entitled to an instruction on permanency, but Shoppers could "argue the weight that the jury should attach to it."

We have said that "when the bad effects of an injury have continued for years, lay[persons] may reasonably infer permanence, even though there is no expert prediction that these injury residuals will continue. Evidence of pain and suffering in existence at the time of the trial has been held sufficient to take the question of permanence to the jury." *American Marietta, supra*, 203 A.2d at 712 (citations omitted). Furthermore, where the issue of permanent damages is properly before the jury, as we conclude it was in this case,

"the jury ... [is given] broad discretion in awarding damages ... [as long as] its award [is] supported by 'substantial evidence.' " *Estate of Underwood v. National Credit Union Admin.*, 665 A.2d 621, 642 (D.C.1995).

Shoppers presented no testimony regarding the nature or permanency of Ms. Moreno's injuries. However, both Ms. Moreno and her orthopedic specialist testified concerning the nature of her injury and her continuing problems. Her orthopedic specialist stated she will continue to experience discomfort. Ms. Moreno testified that she still suffered from the injury at the time of the trial, had to wear a back brace, and had to limit or cease doing certain activities. This testimony from the doctor and Ms. Moreno provided an adequate basis to justify permitting the jury to consider and award future damages for permanent injury.

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

So ordered.

SCHWELB, Associate Judge, dissenting:

The District's long-arm statute provides that "[w]hen jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him." D.C.Code § 13-423(b) (1995). Asuncion Moreno's assertion of personal jurisdiction over Shoppers Food Warehouse MD Corp. (Shoppers) was "based solely" on § 13-423, but she failed to demonstrate that her claims "ar[ose] from" Shoppers' contacts with the District. I would therefore hold that the motions judge should have granted Shoppers' motion to dismiss for lack of personal jurisdiction.

I.

Shoppers is a Maryland corporation. It operates no stores in the District, and it has no office here. In opposing

Shoppers' motion to dismiss the complaint for lack of personal jurisdiction, however, Ms. Moreno claimed that Shoppers transacts business in the District, within the meaning of § 13-423(a)(1), by advertising in The Washington Post and the Yellow Pages, and that the Superior Court therefore had jurisdiction over Shoppers.

The burden of proving the necessary jurisdictional facts, as set forth in the long-arm statute, is on the plaintiff. *Trerotola v. Cotter*, 601 A.2d 60, 64 n. 2 (D.C.1991), *citing McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182, 56 S.Ct. 780, 80 L.Ed. 1135 (1936).[1] Ms. Moreno has not alleged, by affidavit or otherwise, that her presence in Shoppers' store was precipitated by those advertisements, nor has she claimed that her injury was related in any way to Shoppers' jurisdictional contacts with the District. The question before us is whether, under these circumstances, the motions judge correctly held that the court had jurisdiction over Shoppers.

II.

In order to defeat Shoppers' motion to dismiss the complaint, Ms. Moreno was required first, to establish jurisdictional facts sufficient to reach the defendant under the District's long-arm statute, and second, to show that it would be consistent with due process to require Shoppers to defend the suit in the District. *See International Union of Electrical, Salaried, Machine, and Furniture Workers v. Taylor*, 669 A.2d 699, 699-700 (D.C.1995). Here, the first and dispositive question is whether Ms. Moreno has alleged facts which bring the case within the jurisdictional requirements of D.C.Code § 13- 423(b), or, more specifically, that the claim arises from

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[1] The motions judge wrote in her order of June 22, 1994 that "the burden of proving that jurisdiction is improper is on the moving party."

Shoppers' activities in the District.[2] If Ms. Moreno has not satisfied this statutory requirement, then we have no occasion to inquire as to whether the Constitution has been transgressed. *Id.* at 700. Indeed, if the case can be decided on statutory grounds, then any constitutional inquiry would contravene the "deeply rooted doctrine that a constitutional issue is to be avoided if possible." *Id.* (citation omitted).

"Courts have uniformly held that a subsection (a)(1) confers personal jurisdiction over a defendant only if the plaintiff's claim arises from the defendant's contact with the District." *Everett v. Nissan Motor Corp.*, 628 A.2d 106, 107 (D.C.1993) (citation omitted). Accordingly, we have repeatedly dismissed claims where the "arising from" requirement of § 13-423(b) has not been satisfied. *See, e.g., id.* at 107-08 (products liability suit against Nissan following an automobile collision in North Carolina did not arise out of Nissan's distribution of automobiles in the District); *Trerotola, supra*, 601 A.2d at 64-66 (employee's claim for a retirement gift based on implied contract did not arise out of employer's representation of unions in the District); *Berwyn Fuel Inc. v. Hogan*, 399 A.2d 79, 80 (D.C.1979) (per curiam) (personal injury suit against fuel company whose truck struck a car in Maryland did not arise out of fuel company's occasional deliveries to the District).

The present case falls neatly within these precedents. Whatever the nature and extent of Shoppers' activities within the District, Ms. Moreno's injury did not arise from those activities. So far as we can discern from the record, Ms. Moreno would have suffered the injuries for which she seeks compensation in this action even if Shoppers had not advertised in the District at all.

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[2] I agree with the majority that the "transacting any business" requirement of subsection (a)(1) has been satisfied.

According to the majority, "[o]ur case law has not construed § 13-423(b)'s 'arising from' requirement restrictively." Maj. op. at 110. The cases that I have cited, however, stand for the proposition that the statutory language is to be construed in accordance with its terms. *See also Bayles v. K-Mart Corp.*, 636 F.Supp. 852, 854 (D.D.C.1986) ("the 'arising from' requirement ... has been strictly enforced by courts in this jurisdiction"); *id.* at 854 n. 2 (citing cases). We have explained that

> the statute would not grant the Superior Court jurisdiction over a nonresident defendant with respect to a claim arising from a shipment of goods to a purchaser in Pennsylvania, solely on the ground that the defendant had also shipped goods to purchasers in the District.

Cohane v. Arpeja-California, Inc., 385 A.2d 153, 158 (D.C.) *cert. denied*, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978); *accord Everett, supra*, 628 A.2d at 108; *Berwyn Fuel Inc., supra*, 399 A.2d at 80. Thus, no matter how extensive a defendant's contacts with the District may be, if those contacts are unrelated to the plaintiff's claim, then they cannot serve as a basis for exercising personal jurisdiction under § 13-423(b).[3]

III.

The majority's view that the trial court properly exercised personal jurisdiction over Shoppers appears to rest on the following rationale: (1) under *Trerotola*, § 13-423(b) operates merely as "a due process check" on § 13-423(a)(1), and (2),

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[3] Although it may be predictable that residents of the District will be persuaded by Shoppers' advertising to shop in Shoppers' Maryland stores, see maj. op. at 111, Section 13-423(b) confers jurisdiction only if the particular claim before the court arises from Shoppers' activity in the District, and not if it is predictable that some other plaintiff's claim might so arise.

the exercise of personal jurisdiction over Shoppers comports with due process, because Shoppers "could reasonably anticipate being haled into court" in the District. See maj. op. at 110. I am unable to agree with this reasoning.

The District's long-arm statute, by its terms, confers only limited or *specific* jurisdiction, and not *general* jurisdiction, and it has been construed accordingly.[4] It is true that § 13-423 should be read in conjunction with the Due Process Clause, *see Environmental Research Intern., Inc. v. Lockwood Greene Eng'rs, Inc.*, 355 A.2d 808, 810-11 (D.C.1976) (en banc), but the due process limits of subsection (b) are defined by the constitutional bounds of *specific* jurisdiction. If Ms. Moreno had sought to obtain personal jurisdiction over Shoppers based on a *general* jurisdiction theory, then she could have invoked D.C.Code § 13-334(a) (1995). Section 13-334(a) authorizes service of process on any foreign corporation doing business in the District, and it confers jurisdiction over any such corporation which "carries on a consistent pattern of regular business activity within the [District]." *AMAF Int'l Corp. v. Ralston Purina Co.*, 428 A.2d 849, 850 (D.C.1981) (per curiam).[5]

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[4] "Section 13-423(a)(1) provides special, not general jurisdiction." *Schwartz v. CDI Japan, Ltd.*, 938 F.Supp. 1, 5 (D.D.C.1996); *see First Chicago Int'l v. United Exch. Co., Ltd.*, 267 U.S.App.D.C. 27, 29 n. 2, 836 F.2d 1375, 1377 n. 2 (1988).

[5] In *AMAF Int'l Corp., supra*, the court explained the differences between §§ 13-334(a) and 13-423 as follows:

> Under D.C.Code 1973, § 13-334(a), a foreign corporation which carries on a consistent pattern of regular business activity within the jurisdiction is subject to the general jurisdiction of our courts, upon proper service, and not merely for suits arising out of its activity in the District of Columbia. This is in direct contrast to the "transacting any business" provision of our long-arm statute, § 13-423(a)(1), under which jurisdiction is limited to claims arising from the particular transaction of business which forms the basis

The distinction between statutes conferring general jurisdiction and those conferring specific jurisdiction becomes more readily apparent when § 13- 334(a) and § 13-423 are compared to their corresponding bodies of Supreme Court case law. Both § 13-334(a)[6] and the Supreme Court's general jurisdiction due process cases[7] pertain to the exercise of jurisdiction over nonresident corporations for *any* suit, based on the continuing nature and extensive character of the defendant's contacts with the forum. In contrast, both § 13-423 and the Supreme Court's specific jurisdiction cases[8]

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of jurisdiction. D.C.Code 1973, § 13-423(b).

428 A.2d at 850. (Footnote and citations omitted.)

[6] D.C.Code § 13-334(a), as we have noted in the text, confers jurisdiction over foreign corporations "doing business" in the District. "Doing business" requires a "continuing corporate presence" in the forum. *AMAF Int'l Corp., supra*, 428 A.2d at 851. This standard contemplates a more substantial connection between the defendant and the District than is required by the long-arm statute. *See Trerotola, supra*, 601 A.2d at 63. Further, "[u]nlike the long-arm statute," § 13-334(a) "confers jurisdiction over the defendant for all purposes, not merely for those claims arising out of the defendant's contracts with the District." *Everett, supra*, 628 A.2d at 108 (citation omitted).

[7] A state may exercise general jurisdiction over a foreign corporation for any purpose, even "in a suit not arising out of or related to the defendant's contacts with the forum," *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), so long as the corporation's contacts are "substantial" and "continuous." *Hughes v. A.H. Robins Co., Inc.*, 490 A.2d 1140, 1146-51 (D.C.1985). This rule is derived from *International Shoe Co. v. Washington*, 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95 (1945), in which the Supreme Court recognized that "continuous corporate operations within a state" may be "so substantial and of such a nature as to justify suit ... on causes of action arising from dealings entirely distinct from those activities." *See also Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952).

[8] Specific jurisdiction lies where the litigation results from alleged injuries that "arise out of or relate to" the defendant's "purposefully directed"

involve the conferral of jurisdiction where the defendant's contacts with the forum may be less extensive, but where the plaintiff's claim arises from those contacts.

In recognition of this critical distinction, this court has construed, and should continue to construe, the phrase "arising from," as used in § 13- 423(b), in the same literal manner that the Supreme Court has construed corresponding language, *i.e.*, "arise out of, or relate to," in *Burger King Corp., supra*, 471 U.S. at 471-73, 105 S.Ct. 2174, *Helicopteros Nacionales supra*, 466 U.S. at 413-16, 104 S.Ct. 1868, and in other specific jurisdiction cases. If § 13-423(b) is read literally, then we must require proof that the plaintiff's injury arose from the defendant's activities in the District, and that she would not have been injured if these activities had not occurred.

The Supreme Court's decisions in general jurisdiction cases such as *Perkins, supra* note 7, which hold that jurisdiction may be exercised over claims unrelated to the defendant's contacts with the forum where these contacts are systematic, continuous, and "sufficiently substantial," 342 U.S. at 447, 72 S.Ct. 413, have no bearing on actions brought pursuant to § 13-423(a). The Court's "general jurisdiction" authorities would be relevant only if jurisdiction had been

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activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (citations omitted). Where a court seeks to exercise specific jurisdiction, the defendant's "minimum contacts" with the forum need not be as extensive as they must be where general jurisdiction is sought to be invoked. *See, e.g., Helicopteros Nacionales, supra*, 466 U.S. at 413-16, 104 S.Ct. 1868. Indeed, a single transaction may suffice to confer specific jurisdiction. *See, e.g., McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). In the absence of a demonstrated nexus between the contacts and the claim asserted, however, due process is satisfied only if the contacts are sufficiently substantial to support general jurisdiction. *See Helicopteros Nacionales, supra*, 466 U.S. at 415-16, 104 S.Ct. 1868.

claimed pursuant to § 13-334(a), a statute which Ms. Moreno has not cited and on which she has not relied [9]

The majority does not assert that Ms. Moreno's claims "arose" out of Shoppers' contacts in any literal sense. In fact, there is no evidence whatever that Shoppers' advertising in the District induced Ms. Moreno to shop at the defendant's Maryland store, either on the occasion on which Ms. Moreno was injured or at any other time. My colleagues rely instead on the extent of Shoppers' advertising in the District, and they conclude that it would not be unfair to require Shoppers to defend a claim in our Superior Court. The majority thus appears to hold, without specifically saying so, that the long-arm statute may be invoked to confer general jurisdiction over a defendant, even though that statute, by its terms and as heretofore construed, confers jurisdiction only over claims that arise from the defendant's activities in the District.

In my opinion, the majority's approach effectively does away with the distinction between specific and general jurisdiction, as reflected in the language of § 13-423 and § 13-334(a) and in the Supreme Court's analogous jurisprudence. Moreover, the majority's reasoning renders meaningless § 13-423(b)'s provision that jurisdiction under the long-arm statute may be asserted only for a claim for relief arising from the defendant's activities in the forum. Under my colleagues' construction, § 13-423 may be invoked by a plaintiff, such as Ms. Moreno, whose injury is unrelated to the defendant's activities in the District, and who would have been

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[9] Given the majority's affirmance of the judgment, I take no position as to whether, if the court were to adopt my construction of § 13-423, the case should be remanded for consideration by the trial court of the question whether jurisdiction might be founded on § 13-334(a). *Cf. Guevara v. Reed*, 598 A.2d 1157, 1159 (D.C.1991).

injured even if those activities had never taken place.[10] There is obvious tension between the majority's disposition of this case and the prior decisions of this court that have enforced subsection (b) according to its terms.

I would adhere to the distinction we drew in *Everett* between § 13-334(a), which "confers jurisdiction over the defendant for all purposes," and § 13-423, which confers jurisdiction "merely for those claims arising out of the defendant's contacts with the District." 628 A.2d at 108 (citation omitted). Because my colleagues view the issue differently, I respectfully dissent.[11]

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[10] Indeed, given the majority's interpretation of § 13-423, there would be little if any occasion for a plaintiff to invoke § 13-334(a) as a basis for general jurisdiction. Our "specific jurisdiction" statute, § 13-423, could do double duty and serve as a "general jurisdiction" statute as well.

[11] The majority relies heavily on *Trerotola*, but that case does not support affirmance of the judgment. It was never suggested in *Trerotola* that § 13-423 may be invoked as a basis for general jurisdiction. The court did observe that the bounds of § 13-423(b) are defined by the Due Process Clause. 601 A.2d at 64. In defining those bounds, however, the court relied primarily on specific jurisdiction cases. *Id.* at 63-64. Moreover, the court specifically stated that § 13-423(b) requires a "discernible relationship" between the plaintiff's claim and the defendant's contacts with the forum. *Id.* at 64. In the present case, as in *Trerotola* itself, no such "discernible relationship" has been shown.

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ASUNCION MORENO,	*	
	*	
Plaintiff,	*	
	*	Civil Action
v.	*	No. 94-CA-3561
	*	Calendar 7
SHOPPERS FOOD	*	Judge L. Hamilton
WAREHOUSE	*	
MD CORP.,	*	
	*	
Defendant.	*	

ORDER

This matter is before the court on defendant's request for clarification of an order issued December 1, 1995.

Accordingly, it is this 15th day of December 15, 1995,

ORDERED, that the order of December 1, 1995, be and hereby is **vacated**; and it is further;

ORDERED, that defendant's Motion For A New Trial and/or Judgment n.o.v. be and hereby is denied.[1]

/s/ Linda Turner Hamilton
LINDA TURNER HAMILTON
Associate Judge
(Signed in Chambers)

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[1] In terms of the standards for a new trial or judgment n.o.v., in review of the court's trial notes there was more than sufficient evidence to support the verdict and award for future pain and suffering. While this court agrees with defendant that the jurisdictional question should have gone the other way, [illegible] apply the principle of law of the case, there has been no new information presented to this court to revisit (much less "overturn") Judge Duncan-Peters' ruling.

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

CIVIL DIVISION

ASUNCION MORENO	:	
Plaintiff	:	
		Civil Action
vs.	:	No. 94-CA03561
		Judge Turner-Hamilton
SHOPPERS FOOD WAREHOUSE MD CORP.	:	Calendar No. 7
Defendant	:	

ORDER

Upon due consideration of the Motion for Reconsideration of Defendant's Preliminary Motion to Dismiss for Lack of Personal Jurisdiction and any Opposition thereto, it is this 1st day of December, 1995, by the Superior Court for the District of Columbia,

ORDERED, that the Motion be, and is hereby, DENIED. There is no information before the court in terms of the basis of the earlier decision. Thus law of the case controls. Moreover, there was sufficient evidence of future pain and suffering.

/s/ Linda Turner Hamilton
JUDGE
Signed in Chambers

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

CIVIL DIVISION

Asuncion Moreno

Plaintiff

vs

94CA3561
Calendar Number 7
Judge Linda Hamilton

Shoppers Food Warehouse
Md. Corp.

Defendant

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Linda Hamilton, Superior Court Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, it is this 14th day of September, 1995,

ORDERED

(1) That the plaintiff Asuncion Moreno recover of the defendant Shoppers Food Warehouse Md. Corp. the sum

of $197,307.00 with interest thereon from 9/14/95 at the rate of 6 percent per annum as provided by law, and her costs of action.

DUANE B. DELANEY, JR.,
ESQ.
Clerk of the Court

/s/ Sharon Francis
Sharon L. Francis, Deputy Clerk

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ASUNCION MORENO,	*	
	*	
Plaintiff,	*	
	*	Civil Action
v.	*	No. 94-CA-03561
	*	Calendar 7
SHOPPERS FOOD	*	Judge Duncan-Peters
WAREHOUSE	*	
MD CORP.,	*	
	*	
Defendant.	*	

ORDER
(June 22, 1994)

This matter comes before the Court on the Defendant's Motion to Dismiss for an alleged lack of *in personam* jurisdiction, Plaintiff's Opposition to Defendant's Motion to Dismiss, and the Plaintiff's Supplemental Documents filed with a Praecipe on June 20, 1994.

In considering a motion to dismiss, the Court must view the jurisdictional allegations in the light most favorable to the non-movant. *Abramson v. Wallace*, 706 F. Supp. 1, 2 (D.D.C. 1989). Furthermore, the burden of proving that jurisdiction is improper is on the moving party. *Tom Brown & Co. v. Francis*, 608 A.2d 148, 151 (D.C. App. 1992).

The Plaintiff is a District of Columbia resident who alleges that she was injured when she slipped and fell in a Maryland food store owned by the Defendant. This motion is controlled by D.C. Code § 13-423(a). This issue of *in*

personam jurisdiction must be analyzed under a general two-prong test. First, it must be decided whether the long-arm statute applies. Second, it must be determined that the minimum contacts required by due process are present.

A District of Columbia court has personal jurisdiction over a person if he "*causes tortious injury in the District of Columbia* by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed . . . in the District of Columbia." D.C. Code § 13-423(a)(4) (1981) (emphasis added). Plaintiff contends that this section applies because, even though the slip and fall occurred in Maryland, the injury did not manifest itself until the Plaintiff returned to her home in the District of Columbia. This section of the long-arm statute, however, does not apply to the present case because the injury did not occur in the District of Columbia. "District of Columbia law distinguishes the acts or omissions which cause an injury from the injury itself. Thus, the Court must look to where the alleged injury occurred." *Perry v. Criss Bros. Iron Works, Inc.*, 741 F. Supp. 985, 987 (D.D.C. 1990). Here, the Plaintiff slipped and fell in Maryland. Even though the pain and suffering did not begin until the Plaintiff reached the District of Columbia, Maryland is where the actual injury occurred. "[The Plaintiff's] pain and financial loss in the District of Columbia were simply a measure of her damages." *Id.*; *Leaks v. Ex-Lax, Inc.*, 424 F. Supp. 413 (D.D.C. 1976).

Personal jurisdiction may also be asserted by a District of Columbia court "over a person who acts directly or by an agent, as to a claim for relief arising from the person's - (1) transacting any business in the District of Columbia." D.C. Code § 13-423(a)(1) (1981). In order for this section to apply, the claim must arise out of the transaction of business in the District of Columbia. *Clements Distrib. Co. v. Celebrity Prod.*, 699 F. Supp. 322 (D.D.C. 1988). This section has

generally been broadly interpreted, limited only by due process considerations. *Id.* "All that is needed . . . is 'some affirmative act by which the defendant brings itself within the jurisdiction and establishes minimum contacts.'" *Id.* at 322-323 quoting *La Brier v. A.H. Robins Co.*, 551 F. Supp. 53, 55 (D.D.C. 1982). The inquiry into minimum contacts is the second prong of the general test.

The minimum contacts analysis was established to ensure that traditional notions of fair play and substantial justice were not violated. Several of the factors considered in this analysis are: (1) the reasonableness of requiring a defendant to defend a suit in the forum where it is initiated; (2) whether there was an act by the defendant by which it purposely availed itself of the privilege of conducting activities in the forum state; (3) whether the defendant's contacts with the forum are of a quality and nature to manifest a deliberate and voluntary association with the forum, and (4) whether the defendant's contacts were such that it could reasonably anticipate being haled into court there. *Daniels v. Kanoff*, 116 Daily Wash. L. Rptr. 2053, 2056 (Super. Ct. 1988). *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 297-98 (1980). In *Daniels*, a District of Columbia resident sued Peoples Service Drug Store, Inc., a Virginia corporation. The corporation moved to dismiss the claim for lack of jurisdiction because none of its drug stores were located in the District. In its opinion, the court stated that there was jurisdiction under the District's long-arm statute because Peoples Service Drug Stores, Inc. solicited business and advertised in the District of Columbia and owned more than twenty-five stores in Virginia, several of which were located within five miles of the District of Columbia line. *Id.* at 2056-57. The Court in *Daniels* concluded that these circumstances "point clearly not only to the reasonableness of requiring the defendant to defend a suit here, but to the foreseeability of injury to District of Columbia plaintiffs as a result of defendant's actions and the consequences of its actions by soliciting and advertising for

business in the District of Columbia." *Id.* at 2057. After examining the factors listed in *Daniels*, this Court concludes that there are enough contacts with the District of Columbia in this case to satisfy the minimum contacts requirement.

First, it is reasonable to require the Defendant to defend this suit in the District of Columbia. Reasonableness "depends on several factors, including 'the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief.'" *Tom Brown & Co.* 608 A.2d at 152 *quoting Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). The Defendant owns numerous stores in Maryland and Virginia, several of which are located within a few miles of the District of Columbia border. *See* Plaintiff's Exhibit # 1 and supplemental exhibits. The Defendant contracts with and advertises in the Washington Post, thereby targeting and soliciting customers in the District of Columbia area. *See* Plaintiff's Exhibit # 1 and supplemental exhibits. Furthermore, the Defendant has failed to "show that it [is] at a 'severe disadvantage' in being required to defend in [the District of Columbia]". *Id.* at 152 (quoting *Electronic Media Int'l v. Pioneer Communications, Inc.*, 586 A.2d 1256, 1258 (Me. 1991). Since the Plaintiff resides in the District, she has a strong interest in litigating this suit here.

Second, the Defendant, by contracting with Washington based businesses (i.e., The Washington Post, the District of Columbia Yellow Pages) for advertizing purposes, has transacted business in the District of Columbia. Thus, the Defendant purposefully and voluntarily availed itself of the privileges and protections of the District of Columbia. This purposeful and voluntary association with the forum state satisfies the second and third factors in this analysis.

Finally, the Defendant's contacts with the forum state were of such a quality and nature that it is reasonable for the Defendant to reasonably anticipate being haled into court in the District of Columbia. It is reasonable to conclude that the

Defendant derives a substantial portion of its revenue from District of Columbia residents—residents it specifically targets with advertisements that demonstrate how the Defendant's prices compare favorably with the prices in supermarkets. See supplemental exhibits. "Even a small amount of in-jurisdiction business activity is generally enough to permit the conclusion that a nonresident defendant has transacted business here." *Envir. Res. Int'l, Inc. v. Lockwood Greene Eng'g, Inc.*, 355 A.2d 808, 811 (D.C. App. 1975). Therefore, it is this 22nd day of June, 1994,

ORDERED that Defendant's Motion to Dismiss is hereby **DENIED**

/s/ Stephanie Duncan-Peters
STEPHANIE DUNCAN-PETERS,
Associate Judge
(Signed in Chambers)

Supreme Court, U.S.
FILED
MAY 31 2000

No. 99-1733

In The

Supreme Court of the United States

SHOPPERS FOOD WAREHOUSE MD CORP.,

Petitioner,

vs.

ASUNCION MORENO,

Respondent.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Asuncion Moreno respectfully opposes Shoppers Food Warehouse's Petition for a Writ of Certiorari (the "Petition"). Shoppers Food Warehouse has not set forth compelling reasons for this Court to grant the Petition. Specifically, (a) there is no important federal question which was decided in the *en banc* decision and which conflicts with decisions of another state court of last resort or of a United States court of appeals; and (b) the *en banc* decision did not address an important question of federal law that has not been settled by this Court. To the contrary, the issues raised by Shoppers Food Warehouse have been addressed, examined, and decided by this Court on numerous prior occasions. For these reasons the Petition should be denied.

SHOPPERS FOOD WAREHOUSE MISSTATES FACTS IN ITS STATEMENT OF THE CASE

Shoppers Food Warehouse misstates facts in its Statement of the Case and throughout the Petition by repeatedly suggesting that it had exceedingly minimum contacts with the District of Columbia. By skirting the hard facts about its conduct, Shoppers Food Warehouse attempts to create an issue that would be appropriate for resolution by this Court; put simply it attempts to phrase the issue as whether jurisdiction should lie where the "*only* forum contacts consist of advertising in a metropolitan newspaper. . . . " (Pet. at 3 (emphasis added.))

The true facts paint a very different picture, and can be summarized as follows:

1. Shoppers Food Warehouse extensively advertised in The Washington Post from October 6, 1993 through December 1, 1993, which includes the date on which Ms. Moreno slipped and fell in a Shoppers Food Warehouse store. Shoppers Food Warehouse continues to advertise extensively, even today, in The Washington Post.

2. The advertisements in The Washington Post appeared several times per week, and contained the following language in bold: "**SHOPPERS TOTAL WAREHOUSE PRICES EVERYDAY! FEATURE PRICES IN EFFECT 7 FULL DAYS!**" The actual text generally contained a picture of the sale item, a description of the product, and the price. (Pet. App. 17a.)

3. The advertisements contained a further inducement, other than price, for persons to travel to Shoppers Food Warehouse. For example, from October 13, 1993 through November 25, 1993, there was an opportunity to win tickets to a Washington Redskins football game and to meet several Redskins football players. There was also an opportunity for customers to receive a free Thanksgiving turkey or ham. (Pet. App. 17a.)

4. The advertisements contained language in bold indicating "**No Matter Where You Live . . . It's Worth The Drive!**" (Pet. App. 17a.)

5. Shoppers Food Warehouse ran television advertisements which aired in the District of Columbia, and listed its store in the District of Columbia Yellow Pages of the C&P Telephone book during 1993-1994. (Pet. App. 17a.)

6. In its advertisements Shoppers Food Warehouse compared its prices to other stores in Maryland, Virginia, and the District of Columbia. (Pet. App. 17a.)

Additionally, it bears mentioning that Shoppers Food Warehouse wrongly asserts that Ms. Moreno never claimed to see the advertisements before going to Shoppers Food Warehouse. (Pet. at 3.) In fact, at the trial of this matter the trial judge refused to allow testimony one way or the other on this point.

The foundation upon which Shoppers Food Warehouse's argument is built is that certiorari should be granted because its "*only* forum contacts consist of advertising in a metropolitan newspaper. . . . " (Pet. at 3 (emphasis added.)) The reality is, however, that Shoppers Food Warehouse engaged in a systematic and continuous course of conduct designed to target District of Columbia Residents. Its *only* contacts indeed are *substantial* contacts, as set forth in paragraphs 1 through 6 above. When the issue is viewed in the appropriate factual light, it becomes readily apparent that there is no serious division of authority in the lower courts in terms of whether jurisdiction should be based over a non-resident defendant whose conduct was as substantial as Shoppers Food Warehouse's conduct was in this case. Shoppers Food Warehouse's arguments should respectfully be seen for what they are, namely, a blind attempt to remove the facts from the issue in hopes of persuading this Court to grant certiorari.

REASONS FOR DENYING THE PETITION

I. The Lower Court Decision Is Consistent with this Court's Prior Decisions

The *en banc* decision is consistent with past decisions of this Court, and comports with due process requirements. This Court has considered time and time again cases that dealt with the issue of whether a defendant sufficiently directed its activities at a forum state to subject it to jurisdiction. For more than fifty years this Court has recognized that a defendant who realizes the "benefits" of a forum state must also face "obligations [which] arise out of or are connected with the [defendant's] activities within the [forum] state." *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This Court further refined the "minimum contacts" analysis thirteen years later in *Hanson v. Denckla*, 357 U.S. 235 (1958), and opined that to assert jurisdiction a defendant must "purposefully avail itself of the privilege of conducting activities within the forum State. . . . " *Id.* at 253. The notion of purposeful availment has been restated by this Court over and over again. In *Shaffer v. Heitner*, 433 U.S. 186 (1977) and *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), this Court declared that the exercise of personal jurisdiction by the forum state was appropriate where a non-resident defendant "purposefully availed [itself] of the benefits and protections" of the forum state. *Kulko*, 436 U.S. at 94; *Shaffer*, 433 U.S. at 216.

Perhaps this Court most clearly laid the analytical blueprint in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), when it underscored that "[t]he limits imposed on state jurisdiction by the Due Process Clause,

in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years." *Id.* at 292. The majority of the *en banc* opinion at the lower court correctly noted that *World-Wide Volkswagen* references the "fundamental transformation in the American economy" and "the economic interdependence of the States." *Id.* at 293. Put simply, the Supreme Court has previously highlighted the two principles governing due process analysis:

> [1] the foreseeability that is critical . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there [and (2) when] a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

Id. at 297 (quoting *Hanson, supra,* 357 U.S. at 253).

The *en banc* decision is consistent with the next series of jurisdiction cases decided by this Court. Three of those decisions are *Keeton v. Hustler Magazine,* 465 U.S. 770 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984); and *Burger King v. Rudzewicz,* 471 U.S. 462 (1985). The facts in *Keeton* closely resemble the facts of the instant case. There, the issue was whether personal jurisdiction was proper where the only connection between the non-resident defendant and the forum state was the monthly sale of the non-resident defendant's magazine.

This Court commented, "Where, as in this case, respondent Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine." *Id.* at 781.

This Court fully addressed the distinction between general and specific jurisdiction in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), and shortly thereafter further elaborated on this point in *Burger King v. Rudzewicz*, 471 U.S. 462 (1985). Essentially, this Court in *Burger King* reiterated three important points: (1) there are no appropriate "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction, but rather the facts of each case must be weighed to determine whether they comport with "fair play and substantial justice"; (2) non-resident defendants who purposefully direct activities towards residents of a forum state are warned about the possibility of being haled to court in the forum state; and (3) jurisdiction is proper where there is a "substantial connection" with the forum state.

II. The Assertion of Jurisdiction over Shoppers Food Warehouse Comports with Due Process

When viewing the conduct of Shoppers Food Warehouse through an accurate lens, it becomes clear that the assertion of jurisdiction by the District of Columbia comports with all notions of due process, and presents no new issues before this Court. Shoppers Food Warehouse does not dispute that it systematically targeted District of

Columbia residents through its advertising. The advertisements featured inducements for shoppers to come to its stores, including opportunities to win tickets to a Washington Redskins football game, or to meet the players. Most important, however, is the bold declaration in the advertisements that "No matter where you live . . . it's worth the drive." (Pet. App. 17a.)

These advertisements create such a systematic pattern of eliciting a specific consumer response that it makes the assertion of jurisdiction constitutional. The advertisements are not random, fortuitous, accidental, or attenuated. *See Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984). In addition to airing television advertisements in the District of Columbia, Shoppers Food Warehouse placed large, illustrated advertisements in The Washington Post, which is the largest newspaper in the District of Columbia. Further, Shoppers Food Warehouse placed advertisements in the District of Columbia Yellow Pages of the C&P Telephone book. The purpose of this marketing plan remains clear – to solicit customers from the District of Columbia to its stores "with the expectation" that the District of Columbia residents would purchase products sold in those stores. *See Burger King v. Rudzewicz*, 471 U.S. 462, 473 (1985). It follows, then, that Shoppers Food Warehouse certainly purposefully availed itself of the privilege of conducting activities within the District of Columbia, and should reasonably have anticipated being haled into court here. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Shoppers Food Warehouse implies that certiorari should be granted because the facts before the Court present a new twist on whether due process has been

met, insofar as it was not put on notice that it could be sued by a District of Columbia resident in the District of Columbia. This position is at odds with the factual reality of retail sales. To this end, the *en banc* majority correctly opined that Shoppers Food Warehouse had "fair warning" that it could be sued by a District of Columbia resident who slipped and fell in one of its stores. (Pet. App. 20a.) The logic is clear, and presents no new twist on due process:

(a) Shoppers Food Warehouse engaged in systematic and continuous advertising in the District of Columbia;

(b) Its stores are located just minutes from the border of the District of Columbia;

(c) As a grocery retailer, it reasonably should have anticipated that its customers – whether from the District of Columbia, Maryland, or Virginia – would be subject to the same hazards as other customers including a slip and fall incident.

The majority in the *en banc* opinion further highlights the important compounding fact that the Metropolitan Washington D.C. area functions as a "unified legal and commercial community." (*Id.* at 21a.)

Shoppers Food Warehouse also argues that the facts of this case are ripe for review because there is no nexus between its activities and Ms. Moreno's claim. This Court has long held that the claim must "result[ ] from alleged injuries that 'arise out of *or relate to' those activities.*" *Burger King, supra,* 471 U.S. at 472 (quoting *Helicopteros, supra,* 466 U.S. at 414) (emphasis added.) While it is true

(as discussed more fully below) that different jurisdictions have handled the nexus requirement differently, Shoppers Food Warehouse is confused insofar as it contends that this creates an appropriate issue for review by this Court. To the contrary, different jurisdictions may develop different law on this issue of the nexus requirement, so long as due process is met; indeed, this Court has admonished that there be no "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction. *Burger King v. Rudzewicz*, 471 U.S. 462 (1985). The *en banc* majority summarized this argument clearly:

> Where Shoppers has deliberately and directly solicited District residents to become customers in its Maryland and Virginia stores, there can be no doubt that its advertising relates to or has a discernible relationship to a claim by a District resident who becomes a customer in one of Shoppers' stores and is injured. This is true because it is reasonably foreseeable that, as a result of advertising extensively and over a substantial period of time in the District's major circulation newspaper, Shoppers could be sued in the District on a claim similar to that filed by Ms. Moreno. The trial court found that Shoppers "owns numerous stores in Maryland and Virginia, several of which are located within a few miles of the District of Columbia border." The trial court also determined that Shoppers "contracts with and advertises in [T]he Washington Post [and the Yellow Pages], thereby targeting and soliciting customers in the District of Columbia area."

(Pet. App. 28a-29a) (citations omitted). Thus, the assertion of jurisdiction by the District of Columbia comports with due process.

III. Shoppers Food Warehouse Mischaracterizes the Issue as a "Deep Division of Authority"; Simply Because Lower Courts Apply Different Tests Does Not Mean There Is a Division of Authority

Shoppers Food Warehouse erroneously contends that this case presents an opportunity to resolve what it perceives as a "conspicuously open question" in personal jurisdiction cases. (Pet. App. 21.) The argument follows from Shoppers Food Warehouse that this is an important issue because it "arises whenever a nonresident company advertises in one forum and an injury occurs in another." (*Id.* at 18.) Specifically referenced are the travel industry and ski resorts. (*Id.*) Again, Shoppers Food Warehouse refuses to accurately describe the issue before the Court, and merely phrases it as whether jurisdiction should lie where the "*only* forum contacts consist of advertising in a metropolitan newspaper. . . . " (Pet. at 3 (emphasis added.)) In reality the issue – of which there is no division of authority – is whether jurisdiction is proper where a non-resident defendant engages in a systematic and continuous pattern of advertising designed to elicit a predictable consumer response. Shoppers Food Warehouse seems to be skirting its actual contacts with the District of Columbia, including (a) that it extensively advertised in The Washington Post from October 6, 1993 through December 1, 1993, which includes the date on which Ms. Moreno slipped and fell; (b) that the advertisements in The Washington Post appeared several times

weekly, and contained the language in bold "**SHOPPERS TOTAL WAREHOUSE PRICES EVERYDAY! FEATURE PRICES IN EFFECT 7 FULL DAYS!**"; (c) that the advertisements contained a further inducement, other than price, for persons to travel to Shoppers Food Warehouse, including an opportunity to win tickets to a Washington Redskins football game and to meet several Redskins football players; (d) that there was text indicating "**No Matter Where You Live . . . It's Worth The Drive!**" (Pet. App. 17a); and (f) that Shoppers Food Warehouse also ran television advertisements which aired in the District of Columbia, and listed its store in the District of Columbia Yellow Pages of the C&P Telephone book during 1993-1994. (Pet. App. 17a.)

Shoppers Food Warehouse misses the point entirely on the issue of whether there is an important division of authority among the lower courts. Just because different courts at the state and federal level develop different common law on an issue does not mean there is a split of authority. In fact, the role of this Court is to establish the framework within which lower state and federal courts can apply the law as differing factual situations arise. Shoppers Food Warehouse attempts to create a non-existent split, when in reality the split represents nothing more than the application of the law of this Court to different factual circumstances. The issue is not whether there are differing schools of thought on the proper use of the "proximate cause" test, the "related to" test, or the "but for" test; rather, the issue is if the assertion of jurisdiction – whether based on the "proximate cause" test or the "but for" test or the "related to" test – is

constitutional. For good reason this Court has never without regard to underlying facts simply opined which test should be used. Instead, this Court on several occasions has examined the necessary "arising from" requirement, and established the landscape for application of the law.

This Court has on at least three prior occasions examined the same issues which are at the heart of the Petition, and, for that reason, the Court need not again address the issues. Specifically, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), this Court explored the same issues currently before it, namely whether jurisdiction is appropriate under either the "arising out of" or "related to" tests. In fact, in *Helicopteros* this Court delineated the requirements of specific jurisdiction of a claim as merely being either "related to" or "arising out of" the connection with the forum state. *Id.* at 415 n.10. Justice Brennan in his dissenting opinion supported the same test applied by the *en banc* majority when he commented that "[l]imiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant's contacts with the State would subject constitutional safeguards to the vagaries of the substantive law or pleading requirements of each State." *Id.*

The Court again looked at this same issue just one year later in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (U.S. 1985). There is no split of authority simply because different jurisdictions have adopted different tests; lower courts can develop different common law as different factual situations arise, so long as the assertion of jurisdiction comports with due process as delineated

by this Court. This Court squarely addressed this argument in *Burger King* when it specifically rejected the implementation of any "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction. *Id.* at 478; *International Shoe Co. v. Washington,* 326 U.S. at 320. Indeed, this Court completely and fully explored "why a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents." *Burger* King, *id.* 471 U.S. at 473.[1]

Perhaps it was the *en banc* majority who most clearly articulated its review of different authority when it commented as follows:

> Based upon our review of nexus tests used in other jurisdictions, the criticisms leveled at some of them, and the Supreme Court's admonition that there are no "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction, we see no reason to deviate from – and thus we reaffirm – our past decisions which have interpreted the "arise from" language of [the long arm statute] flexibly and synonymously with "relate to" or having a "substantial connection with," in the same way

---

[1] It is worth noting that this Court previously refused to grant certiorari on this issue which came on appeal from *Shute v. Carnival Cruise Lines,* 897 F.2d 377 (9th Cir. 1988). The issue presented on petition for certiorari was whether jurisdiction was properly asserted over a non-resident defendant where the only contact to the State of Washington was advertising in Washington newspapers – the same issue currently before the Court.

> that the Supreme Court's due process analysis has used these terms interchangeably.

(Pet. App. 28a.) In short, there is no division of authority such that this Court should grant certiorari. The *en banc* opinion is consistent with this Court's prior rulings, and the Court has on numerous occasions previously addressed the issues raised in the Petition.

CONCLUSION

For the reasons discussed herein, the Petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SHOPPERS FOOD WAREHOUSE MD CORP.,
Petitioner,

v.

ASUNCION MORENO,
Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States (the Chamber) and The Food Marketing Institute (FMI) hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Counsel for the Petitioner has consented to the filing of this brief; counsel for the Respondent has not consented.

The Chamber is a prominent federation of business companies and associations with substantial membership in each of the 50 States and the District of Columbia. FMI is a nonprofit association of approximately 1,500 food retailers and wholesalers and their customers in the United States and abroad. *Amici* are well positioned to provide the Court with

insight concerning the significance of this case of a broader scope than is available to the parties alone.

The jurisdictional issue presented in this case is of great significance to the Chamber, FMI, and their members. The current state of the law with respect to jurisdiction predicated on advertising alone is in disarray, adding greatly to the litigation costs and uncertainties incurred by members of the Chamber and FMI. The Chamber and FMI respectfully submit that they are well positioned to offer the Court additional information as to the significance of the question presented and the ways in which legal uncertainty and confusion will worsen absent guidance from this Court.

For the foregoing reasons, *amici* respectfully request leave to file the attached brief.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States (the Chamber) and The Food Marketing Institute (FMI), as *amici curiae*, respectfully submit this brief in support of the petitioner.[1]

STATEMENT OF INTEREST

The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the fifty states and the District of Columbia, the

[1] This brief was written entirely by counsel for the Chamber and FMI, and no person or entity other than the Chamber and FMI, their members, or their counsel have made any monetary contribution to the preparation or submission of this brief.

Chamber represents an underlying membership of nearly 3,000,000 businesses and organizations, with approximately 140,000 direct members of every size, in every sector of the economy, and every region of the country. The vast majority of the Chamber's members are small businesses.

An important function of the Chamber is to represent the interests of its members in important matters before the federal courts as well as before Congress and the Executive Branch, including federal agencies and commissions. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases before this Court that have raised issues of vital concern to the nation's business community. Recent representative cases in which the Chamber has filed *amicus curiae* briefs include: *Kolstad v. ADA*, 527 U.S. 526 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Auer v. Robbins*, 519 U.S. 452 (1997); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

Significantly, the Chamber filed *amicus curiae* briefs both at the petition stage and on the merits in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), a case in which the Court previously considered, but did not decide, the jurisdictional question presented by the petition here. As stated in the Chamber's briefs in *Carnival Cruise*, the Chamber conducted a survey among its membership at that time. That survey revealed that resolution of the jurisdictional question was of substantial concern to the Chamber's membership because of the uncertainties and inefficiencies engendered by the unsettled state of the law and because of the costs entailed in complying with a rule like that adopted by the lower court here. *See* Motion of the Chamber of Commerce of the United States for Leave to File Brief *Amicus Curiae* in Support of Petitioner (No. 89-1647) at 2-3; Brief *Amicus Curiae* of the Chamber of Commerce of the United States in Support of the Petitioner

(No. 89-1647) at 10 (hereafter, Chamber *Carnival Cruise* Brief).

In the years since *Carnival Cruise*, the division and confusion among the lower courts over the jurisdictional question at issue here has not diminished, but has worsened as more courts have considered the issue and have continued to issue inconsistent holdings. The interests that justified the Chamber's participation in *Carnival Cruise* thus not only still exist, but have become more pressing in the intervening decade.

FMI is a nonprofit association that conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 members and their subsidiaries—food retailers and wholesalers and their customers in the United States and around the world. FMI's domestic member companies operate approximately 21,000 retail food stores with a combined annual sales volume of $220 billion—more than half of all grocery store sales in the United States. FMI's retail membership is composed of large multi-store chains, small regional firms, and independent supermarkets.

Like the Chamber, FMI has filed *amicus curiae* briefs in cases before the Court that implicate issues of special concern to its members. *E.g.*, *Quality King Distributors, Inc. v. L'anza Research International, Inc.*, 523 U.S. 135 (1998). This is such a case. Like petitioner, FMI's members regularly advertise their retail food stores in newspapers and other media. They thus face the same risk as petitioner of being haled into court in a State based solely on that advertising, despite the fact that they might maintain no operations in the State and that the claims against them do not arise out of or relate to that advertising. That risk imposes significant costs on FMI's members, and ultimately on the broad segment of consumers who shop at the thousands of retail stores operated by those members.

QUESTION PRESENTED

May a long-arm statute constitutionally reach a nonresident defendant when the defendant's only activities in the forum consist of advertising and when the out-of-state accident did not arise from that advertising?

SUMMARY OF ARGUMENT

The lower federal and state courts are hopelessly divided on the standards governing the exercise of personal jurisdiction over nonresident defendants. This confusion has a deleterious effect on the administration of justice, as it yields unpredictable outcomes and encourages protracted and expensive litigation over what ought to be a straightforward threshold issue. This confusion also has deleterious effects outside the courtroom. Because it is uncertain what activities will subject a nonresident defendant to a State's long-arm jurisdiction, many businesses find it practically impossible or prohibitively expensive to structure their affairs so as to avoid being haled into court in distant States with which they have no meaningful contacts.

These problems are not limited to a particular industry or geographic region, but affect all sectors of the economy throughout the country. New communications technologies like the Internet only compound the problem, because they provide an additional source of potential contacts on which a State can rely to exercise jurisdiction over a nonresident defendant. This situation can only be corrected by guidance from this Court.

The approach adopted by the court below also eliminates the distinction between general and specific jurisdiction. This approach allows a State to exercise jurisdiction over a nonresident defendant without regard to the limits imposed by due process on each form of *in personam* jurisdiction. The petition should be granted so the Court can provide needed

instruction to the lower courts that such an approach is constitutionally infirm.

ARGUMENT

I. THE QUESTION PRESENTED HAS DEEPLY DIVIDED THE LOWER COURTS AND HAS CREATED CONFUSION AND DELAY IN THE ORDERLY DISPOSITION OF CASES

The proper exercise of personal jurisdiction is a bedrock constitutional principle of extreme importance. As this Court has recognized, the due process constraints on the exercise of personal jurisdiction are a fundamental liberty interest. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985); *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702-03 & n.10 (1982). That interest ensures that a person is not bound by a judgment of a forum with which he lacks meaningful relations. *Burger King*, 471 U.S. at 471-72; *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

The due process constraints on the exercise of personal jurisdiction also play a critical role in fostering federalism and interstate comity. The due process clause "operates to restrict state power." *Burger King*, 471 U.S. at 472 n.13. This preserves the authority of each State to adjudicate claims in which it has a legitimate interest by preventing other States with tangential, or non-existent, interests from rendering "binding judgments" over the former's citizens. *Id.* at 471-72; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

In light of the profound importance of jurisdictional rules to individual liberties and our structure of government, the application of those rules ought to be clear and direct. Jurisdictional rules that engender confusion and extensive litigation render a great disservice to courts and litigants. As

this Court stated in *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980):

> "It is of first importance to have a definition . . . [that] will not invite extensive threshold litigation over jurisdiction," although the resulting "differentiations of treatment . . . appear somewhat arbitrary." American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts 128 (1969). "Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources." Currie, The Federal Courts and the American Law Institute, Part I, 36 *U. Chi. L. Rev.* 1 (1968).

Given the confusion and division among the lower courts over the jurisdictional question presented here, the exercise of personal jurisdiction over nonresident defendants is anything but "as self-regulated as breathing." This Court has labored to provide direction to the exercise of specific personal jurisdiction by providing a two-step analysis that considers (1) whether the defendant purposefully availed itself of the benefits of the forum by activities directed at the forum and (2) whether the claims against the defendant "arise out of or relate to" those activities. *E.g.*, *Burger King*, 471 U.S. at 472.

This Court has addressed on several occasions the first of those criteria. *E.g.*, *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). The Court, however, has not explained the meaning and limits of the second criterion. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984) (declining to rule whether "arise out of" has same meaning as "relate to"). Because of that lack of direction, lower courts have developed differing and often internally inconsistent approaches toward the application of that criterion, as described in the petition in this case.

As a result, cases brought against nonresident defendants often entail protracted and expensive litigation over the issue whether the case, in the words of *Navarro*, "is in the right court." Litigants, and courts, are uncertain what standard determines the existence of personal jurisdiction. Even where a court has expressed a standard, litigants are often left guessing how it applies to a particular case, since the rules some courts have adopted in this area produce inconsistent results with seemingly similar fact patterns.

This is best demonstrated by the inconsistent treatment petitioner has received before the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia. *See* Pet. at 4. Similar inconsistencies, however, exist throughout the country. *Compare Alexander v. Circus Circus Enterprises, Inc.*, 939 F.2d 847 (9th Cir. 1991), opinion withdrawn and superseded on other grounds, 972 F.2d 261 (1992) (occasional newspaper ads in forum state and maintenance of toll-free number create jurisdiction over nonresident hotel operator) *with Pizarro v. Hoteles Concorde International, C.A.*, 907 F.2d 1256 (1st Cir. 1990) (placement of occasional ads in forum state did not create jurisdiction over nonresident hotel operator). Consequently, litigants have every incentive to litigate fully the existence of personal jurisdiction because the answer to the question is seldom self-evident, thereby extending the lawsuit and increasing the costs of litigation.

The facts of this case bear out this phenomenon. Respondent's accident happened on October 20, 1993. Pet. at 3. Respondent acted with dispatch in pursuing her claim, filing suit on April 5, 1994. *Id.* But any swiftness to her claim ended then. Because petitioner believed, rightly, that personal jurisdiction did not exist over it in the District of Columbia, petitioner sought to dismiss the action on that grounds. What followed was extensive litigation over the threshold question of whether respondent's claim was in the right court. There were

several rounds of briefing and hearings on the issue before the trial court, both before and after trial. The same is true at the appellate level, with the jurisdictional issue in this case receiving consideration by a three-judge panel and then by the court *en banc*.

No one can fault petitioner for pressing its jurisdictional argument. Given the unsettled state of the law and the sharply divided *en banc* decision below, no one can gainsay that petitioner has been justified in pursuing its defense. Nonetheless, the parties have been required to expend considerable attorney's fees and time in litigating the issue, with the consequence that more than six years have passed since respondent filed suit. Despite that passage of those years, the threshold question whether this lawsuit was filed in the "right court" still is not resolved.

Such a state of affairs should be unacceptable. It is unfair to both plaintiffs and defendants. It is a time-consuming drain on judicial resources and the orderly administration of justice. And it engenders confusion and costs outside the courtroom, as individuals and businesses struggle to conduct their affairs without knowing what activities suffice to hale them into a distant forum to defend claims unrelated to that forum.

Nor is this a problem unique to businesses in the District of Columbia metropolitan area. All businesses that advertise in nationally distributed periodicals are exposed to the same jurisdictional risk as petitioner. Moreover, some degree of interstate contact is an almost inevitable consequence of business in our modern economy wholly apart from any advertising. As the Court has observed:

> [M]any commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines.

McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957). That statement is even more true today with the blossoming of telecopiers, computers and other forms of electronic communication. And although the contacts that supported jurisdiction in this case happened to be advertising, there is nothing that confines application of the rule applied below to advertising. In other words, any type of contact with a state—such as purchasing supplies from a vendor—might suffice to assert jurisdiction over a nonresident defendant if the claim being sued on does not have to arise from the defendant's contacts with the forum. So even if a business confined its advertising to a single jurisdiction, it still most likely would not be immune from suit in other states.

The burdens that businesses face as a consequence are real. As the survey among the Chamber's members found at the time of *Carnival Cruise*, uncertainty about the States that can exercise jurisdiction over a company may induce the company to curtail its operations out of fear over being sued in distant States, to the detriment of consumers and an efficient market. Alternatively, the costs of doing business—and ultimately the amount paid by consumers for goods and services—may increase as businesses labor to conform their conduct to unique and unfamiliar laws of multiple States in order to protect themselves in the event they are sued in a foreign State and judged under that State's law. Accompanying this burden is likely to be substantially increased insurance costs to protect against suits in foreign jurisdictions. *See* Chamber *Carnival Cruise* Brief, p. 10.

This burden is especially difficult on small businesses that do not operate on a national scale. Such businesses have no rational basis on which to gauge the jurisdictional risk they face of suit in foreign States and therefore must safeguard against all such risks. The Chamber's survey revealed that the costs of such compliance is prohibitive to most small businesses.

The costs and uncertainties engendered by the current confused state of the law can only be addressed by this Court. This Court has held that accepted notions of fairness and justice required by due process dictate that long-arm statutes must be administered in a manner that provides "'a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimal assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). It is that predictability that gives potential defendants the "fair warning," *Keeton*, 465 U.S. at 774, required by due process about the potential jurisdictional consequences of their activities. There is no predictability now. The petition in this case presents an ideal opportunity for the Court to rectify the situation, to dispel the confusion that currently prevails and to provide much needed order to this important area of the law.

Indeed, the need for such clarity is even more compelling now than when the Court granted certiorari on this issue in *Carnival Cruise* in light of the burgeoning, and inconsistent, jurisprudence regarding personal jurisdiction and the Internet. When the Court granted certiorari in *Carnival Cruise*, the use of the Internet for commercial purposes essentially did not exist. In the intervening decade there has been a veritable explosion in the commercial and personal use of the Internet. The number of individuals on-line grows daily, with millions of Americans having Internet access at home or work. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997) ("The Internet has experienced 'extraordinary growth.' . . . About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999."). The Internet is literally ushering a commercial revolution among American businesses, with billions of dollars of sales over the Internet, which continue to grow each year.

Cf. Reno, 521 U.S. 844, 853 (1997) (describing Internet as "a sprawling mall offering goods and services").

The use and growth of the Internet affects every sector of the economy and all size businesses, from Fortune 500 companies to the sole proprietorships. Its greatest impact, however, may be among small businesses, where the Internet provides a cost-effective means to reach and communicate with more customers than traditional media.

Along with this explosion in use has come an ever expanding number of judicial decisions that grapple with the exercise of personal jurisdiction over an out-of-state defendant based on the defendant's use of or presence on the Internet. Not surprisingly, the inconsistencies that plague the lower courts' treatment of personal jurisdiction based on contacts through traditional media such as newspapers and television have carried over to Internet cases. For example, comparing a web page to an advertisement in a newspaper or on television, some courts hold that personal jurisdiction exists over a defendant that maintains a web page wherever the web page can be accessed. That, of course, is anywhere in the world. *E.g., Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1338 (E.D. Mo. 1996); *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996). In contrast, other courts have required something more than a mere presence on the Internet, although the definition of that necessary additional quantum is often ill-defined and inconsistently applied. *E.g., Chiaphua Components, Ltd. v. West Bend Co.*, 2000 WL 512855 (4th Cir. April 27, 2000); *Rannoch, Inc. v. Rannoch Corp.*, 52 F. Supp. 2d 681 (E.D. Va. 1999); *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

This confusion and inconsistency in the treatment of Internet contacts springs from the same source as the confusion and inconsistency that the parties faced in this case, namely, uncertainty regarding "the relationship among the defendant,

the forum, and the litigation," *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977), necessary to support the exercise of specific jurisdiction over a nonresident defendant. The costs imposed by that confusion will continue to grow as the use of the Internet expands, guaranteeing more lengthy and expensive litigation. Indeed, that confusion could ultimately inhibit the full potential of the Internet if businesses begin to shy away from using the Internet out of fear that they will subject themselves to suit everywhere in the country if they maintain a Web page advertising their business.

And it is not only the Internet that poses additional opportunities for confusion over the exercise of personal jurisdiction. With the advent of other technologies, businesses increasingly find that their advertisements are going farther afield from their home states. With cable and satellite broadcasting, for instance, television signals may be broadcast or receivable throughout the country. Similar effects can occur when two technologies merge. For example, most radio stations now routinely broadcast their signals simultaneously over the air and the Internet. Under the logic of the decision below, a business that contracted for advertising on such a radio station now may be subject to suit in every State.

This Court has shown a keen awareness of the need to keep American law current with the swift pace of modern technology. The Court has, of course, once addressed First Amendment issues and the Internet. *Reno*, 521 U.S. 844 (1997). The Court also has addressed in many other contexts the application of legal principles affected by technological changes. *E.g.*, *Maryland v. Craig*, 497 U.S. 836 (1990) (Sixth Amendment implications of closed-circuit transmission of witness testimony); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (implications of modern medical life support mechanisms on right to privacy); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (applying First Amendment in the context of radio broadcasting); *Katz v.*

United States, 389 U.S. 347 (1967) (applying Fourth Amendment to electronic eavesdropping devices).

In that vein, a guiding force in the Court's enunciation of the modern law of *in personam* jurisdiction has been the need to adapt that law to the contemporary marketplace. *World-Wide Volkswagen*, 444 U.S. at 293-94; *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958). Although the specific factual background of this case involves an advertisement in a newspaper, the question it raises has profound and wide-ranging implications for the use of new communications technologies by American businesses. In this case, the Court can provide much needed guidance regarding the limits of specific personal jurisdictional posed by technological advances in the contemporary marketplace. Absent such direction, the inconsistent judicial treatment of those issues will continue unabated and, potentially, impede the effectiveness and advantages those technologies can offer American businesses and consumers. *Cf. Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 776-77 (1996) (Souter, J., concurring) ("And as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.")

II. THE DECISION BELOW OBLITERATES THE DISTINCTION BETWEEN GENERAL AND SPECIFIC JURISDICTION AND VIOLATES THE DUE PROCESS LIMITATIONS ON THE EXERCISE OF *IN PERSONAM* JURISDICTION

This Court has explicated on multiple occasions the differences between general and specific *in personam* jurisdiction. General jurisdiction does not require a nexus between the cause of action and the defendant's contacts with

the forum State. The exercise of such jurisdiction, however, is appropriate only if the defendant maintains a "continuous and systematic" presence in the forum state. *E.g., Helicopteros Nacionales*, 466 U.S. at 414 nn.8-9; *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952). It is that continuous and systematic presence that satisfies due process and permits the exercise of such jurisdiction, for a party that maintains a continuous and systematic presence in a State has "fair warning" it could be sued there.

Specific jurisdiction, in contrast, does not require the defendant to have a continuous and systematic presence in the forum State. To the contrary, any minimum contact is all that is necessary. However, two other conditions must exist for the exercise of specific jurisdiction to satisfy due process. As discussed above, they are (1) the defendant must have purposefully directed some activity at the forum; and (2) the claim must "arise from or relate to" those activities. *See supra* at 7. It is the fulfillment of these two conditions that constitutionally permits the exercise of personal jurisdiction based on minimum contacts.

The court below effectively collapsed the two categories of jurisdiction and circumvented the due process safeguards applicable to each category. None of the courts below found that petitioner's advertising in the District of Columbia rose to the level of a continuous and systematic presence. Thus, the exercise of general jurisdiction over petitioner was forbidden. But so was the exercise of specific jurisdiction. That is because respondent's cause of action did not arise from petitioner's minimum contacts with the District of Columbia, *i.e.*, its advertising in that jurisdiction. Nonetheless, the court below held that jurisdiction existed over the petitioner, clearly contravening this Court's established precedent.

To achieve that untoward result, the court below took advantage of this Court's decision not to address in

Helicopteros the issue whether the terms "arise out of" and "relate to" mean the same thing. The District of Columbia Court of Appeals decreed that the two terms are not synonyms. This enabled that court, by its way of thinking, to dispense altogether with any consideration whether respondent's cause of action arises out of petitioner's advertising in the District of Columbia and to concentrate instead on the term "relate to." And to determine the meaning of that term, the District of Columbia court fell back on the first of the traditional requirements for specific jurisdiction, *i.e.*, the requirement that the defendant's activities be purposefully directed towards the forum. In a linguistic leap that the meaning of the words plainly cannot bear, the court below held that if petitioner's advertising was purposefully directed toward the District of Columbia, then respondent's cause of action related to that advertising. In other words, the court below equated the two criteria, and in doing so, effectively eliminated the second criterion for specific jurisdiction. All the court below required for the exercise of specific jurisdiction over petitioner was for petitioner to have some minimum contact—if even one act—purposefully directed at the District of Columbia.

That result clearly contravenes the settled principles governing personal jurisdiction enunciated by this Court. The decision below, however, is representative of the pitfalls lower courts around the country are creating because they lack guidance on these issues from this Court. The Court should grant the petition so it can provide that guidance and preserve the due process protections that properly constrain the exercise of *in personam* jurisdiction.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, the Court should grant the petition.

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No. 99-1733

IN THE
Supreme Court of the United States

SHOPPERS FOOD WAREHOUSE MD CORP.,

Petitioner,

v.

ASUNCION MORENO,

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its petition, Shoppers Food Warehouse MD Corp. ("Shoppers") showed that this case presents an unanswered federal question, which is recurring in nature and which has deeply divided the lower courts. It showed that the Court has previously identified the issue, *see Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984), and once before granted review of the question but ultimately did not reach it, *compare Carnival Cruise Lines, Inc. v. Shute*, 498 U.S. 807, 807-08 (1990), *with* 499 U.S. 585, 589 (1991). And it showed that this mature division in lower-court authority raises a matter of great importance to the workings of lower courts, addresses the ever-consequential power of one State to import a cause of action that rightfully belongs to another, and concerns an issue of enduring significance to corporate and individual litigants alike. Since the filing of the petition, the Chamber of Commerce of the United States and the Food Marketing Institute have filed a brief *amici curiae* that supports each of these points and more. Among other reasons for granting the writ, the *amici* contend that "[t]he costs and uncertainties engendered by the current confused state of the law" should be and can only be resolved by the Court. (U.S. Chamber 10.)

Respondent understandably takes a different tack. But none of her contrary arguments develops traction and many of them ultimately confirm the wisdom of reviewing the case. For these reasons, those spelled out in the petition, and those elaborated below, we respectfully submit that the issue warrants the Court's immediate attention.

1. At no point does respondent raise, or even hint at, a procedural obstacle to reviewing the question presented. No jurisdictional impediments exist, a final appealable order is in place, and there is no independent and adequate state ground (as there could not be in this setting) precluding review. Nor does respondent argue that the case contains any other factual or procedural impediments that would create vehicle problems

for addressing the question presented. Respondent's main point, it turns out, is that the *en banc* decision was correct, a position that deserves the Court's full attention and consideration but not, we submit, until review has been granted.

2. Moving from the general to the specific, respondent argues (Resp. 3) that the petition "wrongly asserts that Ms. Moreno never claimed to see the advertisements before going to Shoppers Food Warehouse." How she can say so, though, remains unclear. No record or lower-court citation is offered to support the point. And the argument runs head long into the contrary view of the *en banc* court, which unequivocally found the following: "It is important to note that Ms. Moreno never claimed to have seen the Thanksgiving ad." (Pet. App. 18a n.10.) Nor does the lower-court record back her up. In responding to Shoppers' motion to dismiss for lack of personal jurisdiction at the trial level, no such evidence was ever admitted or even offered. Respondent simply argued that the grocery store solicits customers in the District through *The Washington Post*, metropolitan television networks and the Yellow Pages. She did not attempt to present any evidence establishing a cause-and-effect relationship between her November 20, 1993 visit to the Shoppers store and this advertising.

More fundamentally, this argument misses one of the essential points of the petition and misapprehends one of the lower-court debates that the petition seeks to resolve. As with the non-resident defendant in *Carnival Cruise Lines*, Shoppers contends among other things that a proximate, not a but-for, causal relationship must exist between the cause of action and the defendant's forum contacts before personal jurisdiction will exist. To prevail, Shoppers thus need only show that advertising in the District was not a "material[] element of proof in the plaintiff's" tort action, *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996) (quotation omitted),

which of course it was not in view of the standard elements of a negligence cause of action. In this respect, Shopper's argument, and the resolution of this debate in the lower courts, need not necessarily turn on causation at all. It would turn on whether but-for causation by itself suffices. Accordingly, respondent's factual contention not only is utterly unsupported by the record, but at best just points to another line of division in the lower courts that Shoppers seeks to resolve here.

3. Respondent next accuses Shoppers (Resp. 1-3, 10-11) of belittling the types of media in which the grocery store's advertisements run and the frequency with which they are carried. Properly framed, respondent argues (Resp. 1), the question is not whether jurisdiction exists where the "*only* forum contacts consist of advertising in a metropolitan newspaper," but whether jurisdiction exists when the defendant deploys several types of advertising in the forum State. (Quoting Pet. at 3 (respondent's emphasis)). This argument, too, is wrong and self-defeating. The opening page of the petition leaves no mystery about the question presented: "May a long-arm statute constitutionally reach a nonresident defendant when the defendant's only activities in the forum consist of advertising and when the out-of-state accident did not arise from that advertising?" The petition, in other words, is framed just as respondent wishes: It covers all types of advertising, not just metropolitan newspapers. More than that, however, respondent's emphasis on Shoppers' other advertising media only makes the case more like *Carnival Cruise Lines*, more akin to the other cases that have struggled with this issue and an even better vehicle for addressing this question, because virtually all of these lower court cases involve more than one type of forum advertising. In the end, the issue is whether advertising (no matter the medium) may ever suffice by itself to establish personal jurisdiction over a cause of action that does not arise from those contacts. Respondent's argument serves merely to emphasize the point.

4. Also unavailing is respondent's fainthearted claim (Resp. Br. 14) that "there is no division of authority" in the lower courts over this issue. At no point does respondent support this argument with any discussion of, or even citation to, petitioner's extensive references to lower-court cases and scholarly commentary on this point. She does not disagree that three distinct schools of legal thought have emerged on the issue. She does not dispute that significant judicial resources are being devoted to wrestling with the uncertainty surrounding the question. And she does not dispute that the *en banc* decision itself recognized this depth of division. Add to this the admissions contained in respondent's own brief, and it becomes difficult to escape the reality of this lower-court conflict. In respondent's words: (1) "it is true (as discussed more fully below) that different jurisdictions have handled the nexus requirement differently" (Resp. 8-9); (2) "simply because lower courts apply different tests does not mean there is a division of authority" (Resp. 10); (3) "different jurisdictions may develop different law on this issue of the nexus requirement" (Resp. 9); (4) "[j]ust because different courts at the state and federal level develop different common law on an issue does not mean there is a split of authority" (Resp. 11); and (5) "[t]here is no split of authority simply because different jurisdictions have adopted different tests" (Resp. 12). If words are to have any meaning, it must be true that when "lower courts apply different tests," "there is a division of authority" over the right legal "test[]." By any standard for assessing the "conflict" requirements of Rule 10, respondent's own characterization of the lower-court record should suffice to establish the existence of this mature and recurring conflict.

5. No more helpful is respondent's invocation (Resp. 13) of the Court's statements that there are no "mechanical tests" or "talismanic formulas" for determining personal jurisdiction. (Quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985)). This fatalistic contention deals not with the "arising out of or relating to" inquiry or even with the distinction

between personal and general jurisdiction, but rather with the fairness inquiry that comes at the end of every personal-jurisdiction analysis. It has no relevance to the "arising out of" inquiry, which *Burger King* did not address and which the Court as shown has already identified as worthy of separate and independent consideration.

6. Respondent nowhere responds to the petition's claim (Pet. 21), now bolstered by the Chamber's *amici* brief (U.S. Chamber 13-15), that the specific-jurisdiction test embraced below collapses and ultimately threatens to eliminate the Court's distinction between general and specific jurisdiction. That problem by itself ought to warrant immediate review. Far from addressing this concern, moreover, respondent ultimately exacerbates it through her frequent invocations of the Court's classic general-jurisdiction language ("systematic and continuous" advertising contacts (*e.g.*, Resp. 10)). Most advertising, and certainly most good advertising, frequently will be "systematic and continuous." Though not claiming that general jurisdiction exists in this case and though not cross-petitioning on the point, respondent's references suggest still another test in this area. The theory seems to be that specific jurisdiction turns not on a proximate, a but-for or even a discernible relationship test but on the amount of advertising in a given case. Besides risking a complete collapse between the general- and specific-jurisdiction inquiries, this approach offers just one more school of thought in this area and in the end one more reason for granting the writ.

7. Respondent's other merits arguments (Resp. 12-13) also do not advance her cause. Instead of resolving the issue here, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), all focus on when a party has "purposefully directed" its activities at residents of a forum. They do not determine when a claim "arises out of or relates to" a

defendant's forum contacts, least of all when the only forum contact is advertising. *Keeton*, for example, properly assumed that a libel action arises out of forum contacts when the defendant sent the allegedly libelous magazines into the forum State for sale. 465 U.S. at 780. That, however, just proves that Shoppers may be compelled to defend a false-advertising claim in the District, not that it may be forced to defend a tort action there. *Helicopteros* involved a situation in which "[a]ll parties to the present case concede that respondent's claims against [petitioner] did not 'arise out of,' and are not related to, [petitioner's] activities within Texas." 466 U.S. at 415. After making this observation, the majority noted the unresolved legal issue regarding the interpretation of this requirement, *id.* at 415-16 & n.10, and Justice Brennan in dissent proceeded to analyze how it should be resolved, *id.* at 424-28. Under these circumstances, it remains unclear how respondent can tenably maintain (Resp. 12) that *Helicopteros* has already resolved this issue. Lastly, *Burger King* provides a lengthy analysis of the "fair play and substantial justice" prong of specific jurisdiction, but offers no analytical guidance regarding the "arising out of or related to" prong. 471 U.S. at 476.

8. Respondent's statements (Resp. 13 n.1) regarding *Carnival Cruise Line* are equally elusive. After conceding (*id.*) that *Carnival Cruise Line* presented "the same issue currently before the Court," respondent argues that the Court did not grant review of the issue. Respondent should know better. The Court, in fact, did grant review of this question, 498 U.S. at 807-08, received extensive briefing on the question and entertained oral argument on it. While the Court found "the forum selection clause to be dispositive of [the jurisdictional] question" and thus did not "consider [the] constitutional argument as to personal jurisdiction," 499 U.S. at 589, that by no means shows the Court refused to grant review. And, as we have contended, if the issue warranted review then, it warrants review now, and that is all the more true in view of the

burgeoning lower-court conflict that has arisen in the interim and that shows no sign of disappearing soon.

9. The Chamber's *amici* brief, like its brief in *Carnival Cruise*, bolsters each of these points. First, the Chamber confirms the wide applicability of this recurring issue. "All businesses that advertise in nationally distributed periodicals," the brief observes (U.S. Chamber 8), "are exposed to the same jurisdictional risk as petitioner"—a risk that has expanded dramatically in view of the proliferation of internet commerce and internet advertising. Second, repeating the conclusions of a survey it conducted at the time *Carnival Cruise*, the Chamber notes (*id.* at 9) that the "uncertainty about the States that can exercise jurisdiction over a company may induce the company to curtail its operations out of fear over being sued in distant States, to the detriment of consumers and an efficient market." Third, it observes that small businesses often face the brunt of the burdens imposed by the law's uncertainty. Such companies, it notes (*id.*), "have no rational basis on which to gauge the jurisdictional risk they face in suits in foreign States and therefore must safeguard against all such risks." Fourth, it contends (*id.* at 10) that this division of authority has generated the kinds of "costs and uncertainties" that it is uniquely the role of the Court to resolve. Whether one considers the arguments raised in the petition, the views of the *amici curiae*, the decision of the *en banc* court below, the views of the various Federal and State courts that have struggled with the issue, or the legal commentators, all agree that this important federal question cries out for review.

CONCLUSION

The Court should grant the petition.

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